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No. 04-

In The

Supreme Court of the United States

JACK C. CHILINGIRIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER MONEY AMOUNTS ARE ELEMENTS OF THE OFFENSE OF MONEY LAUNDERING UNDER 18 U.S.C. §1956 AND THE FAILURE TO ALLEGE MONEY AMOUNTS DEPRIVED THE DISTRICT COURT OF JURISDICTION TO TRY, CONVICT AND SENTENCE THE PETITIONER UNDER THE TEACHINGS OF *APPRENDI v. NEW JERSEY*, 530 U.S. 466 (2000) AND *BLAKELY v. WASHINGTON*, 542 U.S. ___ (2004)?

II. WHETHER THE DISTRICT COURT'S FINDING OF GUILT RELATING TO THE ALLEGED CONSPIRACY TO LAUNDER MONEY INSTRUMENTS WAS AN AMENDMENT OF THE INDICTMENT WHERE THERE WAS NO ALLEGATION OF AN AGREEMENT BETWEEN THE NAMED CO-CONSPIRATORS AND NO TESTIMONY AT TRAIL OF AN AGREEMENT BETWEEN UNNAMED CO-CONSPIRATORS AND WHERE THE DISTRICT COURT HAD FOUND PETITIONER NOT GUILTY OF THE PREDICATE ACTS OF MAIL AND WIRE FRAUD ALLEGED IN COUNT 33?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jack C. Chilingirian, respectfully prays that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Sixth Circuit rendered on February 13, 2002 and April 9, 2004 respectively.

OPINIONS BELOW

The Opinions of the Sixth Circuit Court of Appeals are reported at *United States v. Chilingirian*, 280 F.3d 704 (6th Cir. 2002) and *United States v. Chilingirian*, 2004 WL 771175 (6th Cir. April 9, 2004) (Unpublished). The opinions are reproduced at App. 1a-18a and 19a-40a respectively.

STATEMENT OF JURISDICTION

The Judgment of the District Court was entered on October 18, 1999. Petitioner timely filed his Notice of Appeal on October 27, 1999. The Government timely filed its Cross-Appeal on November 24, 1999. The Sixth Circuit Court of Appeals issued its Opinion on February 13, 2002 reversing and remanding for resentencing.

The Amended Judgment of Conviction of the District Court was entered on May 23, 2002. Petitioner timely filed his Notice of Appeal on May 30, 2002. The Sixth Circuit Court of Appeals issued its Second Opinion on April 9, 2004.

On June 17, 2004, the Hon. John Paul Stevens, Associate Justice and Circuit Justice for the Sixth Circuit granted Petitioner's Application for Extension of Time to File this Petition for Writ of Certiorari through and

including September 6, 2004. A further extension through November 15, 2004 was granted to comply with this Court's rules.

At the time of the initial filing of this Petition for Writ of Certiorari, counsel representing the Petitioner in the lower court advised that he was in the process of filing a Motion to Recall the Mandate of the Sixth Circuit issued on May 3, 2004, in light of this Court's decision in *Blakley v. Washington,* 542 U.S. ___ (2004).

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury. . . . Nor shall any person . . . be deprived of life, liberty or property without due process of law."

The Sixth Amendment of the United States Constitution provides in relevant part: "In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation. . . . "

The Money Laundering Statute and the relevant sections read as follows:

> "Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such financial transaction which in fact involves the proceeds of specified unlawful activity – (a)(1) with the intent to promote the carrying on of specified unlawful activity; or (B) knowing that the transaction is

> designed in whole or in part – (i) to conceal or disguise the nature, the location, the source, the ownership, or control of the proceeds of specified unlawful activity . . . shall be sentenced to a fine of not more than $500,000 *or twice the value* of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both . . . " (Emphasis Added).

18 U.S.C. §1956(a)(1)(A)(i) & 18 U.S.C. §1956(a)(1)(B)(i)

18 U.S.C. §1956(h) reads:

> "Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

STATEMENT OF THE CASE**

(1) *Background.* Petitioner, JACK C. CHILINGIRIAN, now 61 years old, is an incarcerated federal inmate presently housed at the Milan, Michigan Federal Detention

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** Any ability for the Petitioner to present a complete supporting Appendix was undermined when he was transferred on July 8, 2004 from Camp Devens in Ayer, Massachusetts, where all of his legal papers remained housed, to the Milan, Michigan FDC, where he arrived on August 9, 2004. He was at the Oklahoma City Transfer Facility for one week during this period and at the Wayne County Jail in Detroit, Michigan for 25 days with no access to a library and no access to a computer or copier during this entire time period. He also lost one month of the two month extension of time granted to file this Petition. Petitioner has sought to obtain his legal papers from the Bureau of Prisons to no avail. The limited Appendix relates to the Appellate Decisions below and the Third Superseding Indictment. All other factual averments are true and accurate and are asserted as a part of the record below either in the Trial Transcripts or contained in the Briefs submitted to the Sixth Circuit.

Center. He was a devoted husband and father who served his country in the Vietnam War, practiced law in the State of Michigan for almost 30 years and garnered a reputation as a hard-working ethical and honest attorney.

(2) *The Indictment Against Chilingirian.* On November 10, 1998, a Grand Jury sitting in the Eastern District of Michigan entered a Third Superseding Indictment (App. 41a-64a) against Chilingirian and two other co-defendants who were former clients of his. In the Third Superseding Indictment, the Government charged Chilingirian with 33 Counts of criminal conduct, including conspiracy to defraud, aiding and abetting, mail and wire fraud, tampering with a witness, interstate transportation of funds taken by fraud and conspiracy to launder money instruments.

In Count 33, the only count on which Chilingirian was convicted, the government charged conspiracy to launder monetary instruments in violation of 18 U.S.C. §1956(h). The Government styled Count 33 as "Conspiracy to Launder Money Instruments" and cited 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h). (App. 58a-59a). The government set forth Count 33 in three paragraphs. In the first paragraph, the government parroted the statutory language of 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(1)(B)(i), but did not describe any specific conduct relating to Chilingirian or any other defendant. (*id.*) The government prefaced the following two paragraphs of Count 33 with the qualifying phrase: "It was part of the money laundering conspiracy that . . . " (*Id.* App. 59a). In each of the final two paragraphs, the government went on to describe in a single sentence generalized conduct allegedly committed by the defendants. (*Id.*) The government concluded Count 33 with the statement: "All in

violation of Title 18, United States Code Section 1956(h)." *(Id.* App. 59a).

Nowhere in Count 33 did the government allege that there was an ***agreement*** between Chilingirian and the co-defendant, JACK RASHID charged in that Count.[1] The Conspiracy was alleged as being between the Petitioner and "with other persons whose names are known and unknown to the Grand Jury." (App. 58a-59a). No evidence of any such **agreement** was presented at trial to establish this element.

3. *The Original Trial and Sentencing.* Commencing on March 25, 1999, Chilingirian stood trial for the various counts alleged in the Third Superseding Indictment. Chilingirian, with the government's consent, agreed to a bench trial with the District Court Judge acting as the trier of fact. The government simultaneously tried Charles Rashid, another co-defendant, to a jury. The government rested its case on April 15, 1999.

On April 29, 1999, the District Court entered a **general finding**, finding Chilingirian NOT GUILTY on all counts except Count 33. Other than the entry of the general finding, the District Court failed to make any additional formal findings at trial, either written or oral regarding Chilingirian's guilt.

On October 18, 1999, the District Court conducted Chilingirian's original sentencing hearing. At that sentencing hearing, the government maintained that the amount of funds laundered was greater than $1,500,000 but less

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[1] This was in contrast to Count 1 of the Indictment which alleged an agreement between all three named co-defendants to conspire to commit offenses against the United States, in violation of 18 U.S.C. §371. (App. 42a-53a). Petitioner was found not guilty of Count 1.

than $2,500,000; specifically the government concurred with a figure of $2,267,000. The District Court adopted the facts as set forth in the pre-sentence investigation report. Nowhere in the Third Superseding Indictment was there any **factual** statement or mention made of the money amount that was allegedly laundered by the Petitioner.

Based on those facts, the District Court by the preponderance of the evidence sentenced Chilingirian under the fraud guidelines to 37 months imprisonment. The District Court did not impose a fine, but did impose an Order of Restitution in the amount of $335,167.50.[2]

4. *Petitioner's First Direct Appeal.* Chilingirian appealed his conviction, asserting, among other things, that his acquittal on all of the fraud counts was inconsistent with the district court's guilty finding on the conspiracy to launder money count; that the indictment was unlawfully amended; and that the indictment was multiplicious. *United States v. Chilingirian,* 280 F.3d 704, 708 (6th Cir. 2002). (App. 5a).

The Government cross-appealed, alleging that the district court erred in applying the fraud guidelines rather than the money laundering guidelines. (App. 5a). The Sixth Circuit affirmed Chilingirian's conviction, but reversed the district court's sentencing order and remanded the case with instructions to re-sentence the Petitioner pursuant to the money laundering guidelines. (App. 18a).

Since Petitioner's direct appeal was not final and to avoid piecemeal review by this Court, the Petitioner did

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[2] Nowhere in the indictment did the government assert or seek restitution, and no money amount in the sum of $335,167.50 appears in the indictment.

not file a Petition for Writ of Certiorari after the decision of February 13, 2002 by the Sixth Circuit.

5. *Re-Sentencing Hearing of May 23, 2002.* On May 23, 2002, the district court held a re-sentencing hearing. Petitioner represented himself pro se. The hearing was perfunctory.[3]

One of the crucial arguments which Petitioner raised before the District Court was that pursuant to the rule announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the district court was deprived of the jurisdiction to try, convict and sentence the Petitioner where all of the elements of the offense charged were not included in the indictment and found by the trier of fact at trial pursuant to the constitutional standard of beyond a reasonable doubt.

Petitioner argued that pursuant to a long line of cases emanating from this Court that the failure to recite any money amounts in Count 33 was fatal to the conviction, and most certainly the sentence that had been imposed. Petitioner relied upon *In Re Winship,* 397 U.S. 358 (1970); *United States v. Gaudin,* 515 U.S. 506 (1995); and *Apprendi*

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[3] It would not be a misstatement to suggest that the re-sentencing hearing which was conducted did not meet the minimal standards of due process. Petitioner had filed five separate Motions which had been submitted to the Court between February 13, 2002 and April 15, 2002. When the Petitioner attempted to raise and argue the various Motions to make a record, the Court, not previously aware of the filing or the content of the Motions, adjourned the proceedings, left the bench, returned in **two minutes** and **summarily denied the Motions** without providing any reasons for the denial. The primary Motion was premised on the rationale of this Court enunciated in *Apprendi,* which contended that Petitioner's sentence should have been only **12 months** because the indictment had failed to allege money amounts as required by the Money Laundering Statute.

to support this proposition. He asserted that under *Apprendi* and this Court's authority recited in *United States v. R.L.C.*, 503 U.S. 291 (1991) the maximum sentence that could be imposed under the Federal Sentencing Guidelines was 0-6 months. Petitioner was arguing that any enhancements for which he was found to be guilty and sentenced under, had to be in the indictment and found at trial beyond a reasonable doubt.[4] It is undisputed that the Third Superseding Indictment failed to recite any money amounts and in fact the amount of money laundered was determined ***after*** completion of the trial and was made pursuant to the preponderance standard.[5] The Petitioner again timely filed his second direct appeal on May 30, 2002 in the Sixth Circuit.

6. *Petitioner's Second Direct Appeal.* Chilingirian in his second direct appeal asserted that the District Court erred by increasing the maximum punishment he faced based on facts not charged in the indictment and proven beyond a reasonable doubt. Petitioner argued that the Due Process Clause requires that the government charge in the indictment and prove beyond a reasonable doubt all facts that subject a criminal defendant to a sentence greater

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[4] Petitioner's arguments in April of 2002 recited in Motions presented to the District Court foreshadowed this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002) and most certainly is supported by the Court's recent holding in *Blakely v. Washington*, 542 U.S. ___, 159 L.Ed.2d 403 (2004).

[5] Petitioner's original sentence was increased from 37 months to 87 months in custody. At least 24 months of this increase was as a result of the Court's preponderance determination that the amount of money which had ***not*** been charged in the indictment and stipulated to by the Government at the time of the first sentencing hearing had now been increased by some $500,000. This additional sum of money raised Petitioner's Offense level, thereby the ultimate increase in his sentence.

than the maximum otherwise authorized. Further, the district court had sentenced the Petitioner based on a number of enhancements not charged in the indictment nor proven beyond a reasonable doubt.[6]

7. *The Sixth Circuit's Second Reversal and Remand.* On April 9, 2004, the Sixth Circuit again reversed and remanded for re-sentencing. Although, acknowledging the Petitioner's argument that "the operation of the offense-defining statute in conjunction with §2S1.1 of the sentencing guidelines results in a relevant maximum sentence of twelve months," (App. 23a), the Sixth Circuit rejected the Petitioner's rationale that a defendant money-launderer's enhancement under the guidelines based on the amount of funds laundered had to be submitted to the trier of fact and found beyond a reasonable doubt.

Rejecting the Petitioner's *Apprendi* and *Ring* arguments, the Sixth Circuit nevertheless again reversed the district court's resentencing order on the grounds that (1) the district court had failed to make independent findings pursuant to Fed R. Crim. P. 32(c)(1) and (2) that the re-sentencing range under the 1995 Guidelines might lower

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[6] The enhancements which the Court relied upon and which were not in the indictment were (1) based on the mistaken finding that Petitioner was convicted or otherwise could be responsible for the underlying crime of mail and wire fraud. (The district court had found Petitioner ***not guilty*** of all counts 2-29 of mail and wire fraud); (2) the district court erroneously applied a two level enhancement for misrepresentation or other fraudulent action during the course of a bankruptcy proceeding. (The district court should not have applied such an enhancement without a factual showing of intervening conduct that would warrant such an enhancement); and (3) again erroneously relying upon a higher value of funds allegedly laundered despite the fact that there was no new evidence presented at the re-sentencing hearing that was not available at the original sentencing hearing.

the possible sentence which the Petitioner could have received. (App. 32a).

The re-sentencing hearing mandated by the Sixth Circuit took place on October 26, 2004 before the District Court. The District Court reaffirmed Petitioner's sentence without awaiting this Court's further clarification of *Blakley*. Petitioner has sought counsel of record in the Sixth Circuit to file a Motion to Recall the Mandate to offer to the Sixth Circuit the opportunity to re-visit the unconstitutional sentence which was imposed upon him. To preserve his challenge to the Judgment of Conviction the Petitioner seeks review by the submission of this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

This Court's recent decision in *Blakley v Washington,* once again implicates and again brings to heightened awareness the principle "that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Jones v. United States,* 536 U.S. 2[illegible]7, 253 (1999) (concurring opinion Scalia, J.). Further, that under *Apprendi v. New Jersey,* due process requires proof of all facts which constitute the elements of the crime beyond a reasonable doubt. 530 U.S. at 477.

The Money Laundering Statute 18 U.S.C. §1956(a)(1) & (a)(2) contains similar provisions which recite that the penalty for violating sections of the statute may result in a sentence based upon "twice the value of the property involved in the transaction. . . . " Thus, the value of the money amount allegedly laundered must be asserted in the indictment and proven at trial beyond a reasonable doubt, since this is one of the penalties to which the accused is exposed. The teachings of *Jones* and *Apprendi*

which have now come to complete fruition in *Blakely* are applicable to the facts of the instant case.

This case presents the ideal vehicle to resolve the ambiguity of the Money Laundering Statute to avoid the violation of the constitutional principles denoted above and which have resulted in an unconstitutional conviction and sentence in the instant case.

Further, the finding of guilt in the instant case resulted from an unconstitutional amendment of the indictment in clear contravention of this Court's precedent in *Stirone v. United States,* 361 U.S. 212 (1960) and *Russell v. United States,* 369 U.S. 749 (1962).

As evidenced by the allegations in Count 33, the underlying specified unlawful activity which Petitioner was charged with in conspiring to launder money instruments was mail and wire fraud. (App. 59a). The district court's finding of **not guilty** on the predicate acts of mail and wire fraud and the finding of guilt on the conspiracy to launder money instruments count was a broadening of the indictment in violation of the Fifth Amendment of the Constitution.

Moreover, the Sixth Circuit opinion asserting that the acquittal of the predicate acts underlying the money laundering charge did not constitute an amendment of the indictment creates a conflict with the Second and Tenth Circuit cases of *United States v. Handakas,* 286 F.3d 92 (2d Cir. 2002) and *United States v. Rahasaperian,* 231 F.3d 1257 (10th Cir. 2000) respectively, which have held to the contrary on this point.

This Court should grant the Petition for Writ of Certiorari to resolve this conflict between the circuits.

A. The District Court Was Deprived of the Indispensable Jurisdiction to Sentence and Convict the Petitioner Where All of the Elements of the Offense Charged in Count 33 Were Not Pled in the Indictment and Found by the Trier of Fact at Trial by the Constitutional Standard of Beyond a Reasonable Doubt.

1. Money Amounts Are an Element of the Offense of Money Laundering.

As evidenced by the language in the Money Laundering statute, the penalty for violating that statute in part is fixed at "twice the value of the property involved in the transaction." No such values were recited in the indictment in the instant case.

The Sixth Amendment to the United States Constitution requires that in all criminal proceedings, the accused shall have the right to be informed of the nature and cause of the accusations brought against him.

This right has been upheld many times by this Court as being fundamental in the law of criminal procedure:

> "The object of the indictment is, first, to furnish the accused with such description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had." *United States v. Cruikshank*, 92 U.S. 542, 558 (1876).

This rule has continued to grow and be vital in protecting the accused. In a long line of cases dating back over a hundred years, this protection embraced in the Sixth

Amendment has not been undermined. This rule has been restated on numerous occasions by this Court. In the case of *In Re Winship,* 397 U.S. 358 (1970), this Court held that a defendant was entitled to a finding on each and every ***fact*** necessary to constitute the crime with which he is charged and for such findings to be found by the fact finder at trial beyond a reasonable doubt. 397 U.S. at 364.

Again, this Court reaffirmed this very rule in *United States v. Gaudin,* 515 U.S. 506 (1995) where it was held that a criminal conviction must rest upon the jury determination that the defendant is guilty of ***every element*** of the crime with which he is charged beyond a reasonable doubt. 515 U.S. at 510.

Most recently, in the trilogy of cases beginning with *Apprendi v. New Jersey, supra,* and followed by *Ring v. Arizona,* 536 U.S. 584 (2002), and finally in *Blakley v. Washington,* this Court held that the above recited rule was still vital. In *Apprendi,* Justice Stevens writing for a majority stated:

> "[I]t is unconstitutional for a legislature to remove from the jury assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reason-able doubt." 530 U.S. at p. 490.

Subsequently, in *Ring v. Arizona,* Justice Scalia in his concurring opinion which reaffirmed his position in *Apprendi* stated:

> "I believe that the fundamental meaning of the, jury trial guarantee of the Sixth Amendment is that **all facts** essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the

> offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."

536 U.S. 584, 153 L.Ed.2d at 578. (Concurring Opinion, Scalia, J.).

Justice Scalia's reasoning reached its nadir in *Blakley v. Washington*. In applying the above recited rule expressed in *Apprendi,* he stated that "two long standing tenets of common law criminal jurisprudence" are reflected in this principle:

> "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors,' . . . and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and is no accusation in reason.'" 542 U.S. ___, 2004, 159 L.Ed.2d at 412.

Justice Scalia, further in *Blakley* relying upon *Ring v. Arizona,* noted that:

> "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose **solely on the basis of the facts reflected in the jury verdict or admitted by the defendant** . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment . . . and the judge exceeds his proper authority." 159 L.Ed.2d at 413-14. (emphasis in original).

Based upon the above recited authority, the Petitioner contends that if the Federal Money Laundering Statute could have such a reach as to punish defendants for uncharged conduct, specifically for money amounts attributable to the defendant which have not be alleged in the indictment, and which serve to drive his ultimate sentence would truly be the "tail that wags the dog," *McMillan v. Pennsylvania,* 477 U.S. 79, (1986), and the Money Laundering Statute itself would be cast into grave Constitutional doubt. This Court in avoiding such a question as it is required to do when possible, should choose the constriction of the statute which would make it constitutional since it is presumed that Congress intended it to be so.

The Petitioner suggests that in applying the doctrine of constitutional doubt, this Court must find that Congress intended that money amounts be elements of the offense under 18 U.S.C. §1956 which the Petitioner was charged, tried and convicted, since without those money amounts being recited in the indictment it would in fact be "the tail that wags the dog" since those amounts actually serve to dictate what the precise sentence would be.[7]

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[7] In the context of the 87 month sentence imposed upon him, the Petitioner argued in May of 2002 at his re-sentencing hearing that he could only be sentenced to **12 months**, and in his second direct appeal that the failure of the indictment to contain a specified money amount, and the Petitioner not having admitted to a specific money amount, therefore the smallest amount prosecutable would have to form the basis for any sentence imposed, i.e., **12 months**. The Petitioner was seeking to file in the Sixth Circuit a Motion to Recall the Mandate expressing that the *Apprendi* line of cases, as clarified in *Blakely,* establishes that his sentence violated his Sixth Amendment rights and that the imposition of his 87 month sentence constituted clear error. Several lower courts have recently lent support to this sentencing rationale. See *United States v. Shamblin,* 2004 WL 1468561 (S.D. W.Va. June 30, 2004); *United States v. Watson,* No.

(Continued on following page)

2. The Overwhelming Precedent From This Court Supports Petitioner's Contention That Money Amounts Are an Element of the Crime of Money Laundering and Must Be Charged in the Indictment and Proved at Trial Beyond a Reasonable Doubt.

As applied to the facts of the instant case, the Petitioner contends that the failure of the government to allege money amounts in Count 33 was fatal to the conviction and that the decision of the Sixth Circuit affirming Petitioner's conviction in 280 F.3d 704 must be reversed.

Petitioner's review of Justice O'Connor's dissent in *Blakely,* supports the above noted position. There Justice O'Connor stated:

> "Under the majority's approach, ***any fact*** that increases the upper bound on a judge's sentencing discretion ***is an element of the offense.*** Thus facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range – such as drug quantity, role in the offense, risk of bodily harm – ***all*** must now be charged in an indictment and submitted to a jury, . . . *In Re Winship,* 159 L.Ed.2d at 423 (dissenting opinion, O'Connor, J.) (Emphasis Added).

This is a clear acknowledgment that the century old precedent with respect to indictments being required to contain allegations of every fact which is legally essential to the punishment to be inflicted, remains viable today and supports Petitioner's arguments. See, *United States v.*

03-0146 (D.D.C. June 30, 2004); *United States v. Moran,* No. 02-10136 (REK) (D.Mass. July 8, 2004).

Reese, 92 U.S. 214, 232-33 (1876) (concurring opinion Clifford, J.).

Further amplification of this approach was expressed by Justice Souter in *Jones,* supra, where he summarized the issue in these terms:

> "Much turns on the determination that a fact is an element of the offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proved by the government beyond a reasonable doubt." *Jones,* 526 U.S. at 232, citing *Hamling v. United States,* 418 U.S. 87, 107 (1974); *United States v. Gaudin,* 515 U.S. 506, 509-10 (1995).

Finally, the Petitioner points to the best expression by this Court of the view that money amounts should be treated as elements of the offense as applied to the Money Laundering Statute as Justice Thomas' concurring opinion in *Apprendi.* There Justice Thomas indicated that the Fifth and Sixth Amendment constitutional rights that were implicated in that case "turn on determining which facts constitute the 'crime' – that is which facts are 'elements' or 'ingredients' of a crime – " 530 U.S. at 500. Justice Thomas indicated that it was critical to know which facts are elements. He further indicated that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment." (*Id.*). He also noted that:

> "The aggravating fact is an element of the aggravated crime . . . if the legislature rather than creating grades of crimes, has provided for setting the punishment of a crime based on some fact – such as a fine that is proportional to the value of stolen goods – that fact is also an element . . . One need only look to the kind, degree, or range of punishment to which the prosecution

> is by law entitled for a given set of facts. Each fact is necessary for that entitlement is an element." 530 U.S. at 501.

The Petitioner asserts that the indictment upon which he was charged and tried was on its face constitutionally infirm in failing to recite all of the elements of the statute in that the "value of the property involved in the transaction" was not alleged.

That without the benefit of ever charging the precise amount of money alleged by the Government to be attributable to Petitioner's conduct as part of the money laundering scheme, the Government instead merely submitted proof of that element to the Court for consideration as a ***sentencing factor***.

The District Court ultimately determined the amount of money attributable to the Petitioner's alleged illegal conduct during the sentencing phase of the proceedings by the preponderance standard as opposed to the constitutional standard of beyond a reasonable doubt during the trial.

The Petitioner asserts that the analysis which was a part of the arguments presented to the district court at the time of the re-sentencing hearing substantiates that the prosecutor and the district court were without the requisite jurisdiction from the outset to try and convict the Petitioner.

Further, that Petitioner's substantial constitutional rights were abrogated and that the district court as well as the Appellate Court lacked the jurisdiction to impose any sentence as well as affirming any conviction.

Again, support for this argument appears in Justice Thomas' concurring opinion in *Apprendi* where he indicated that the above recited understanding of what constituted

a crime continued well into the 20th century. He concluded by stating that "[t]oday's decision, far from being sharp break with the past, marks nothing more than a return to the ***status quo ante*** – the status quo that reflected the original meaning of the Fifth and Sixth Amendments." 530 U.S. at 518. Justice Thomas declared that "if a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element." 530 U.S. at 519.

Based upon the above authority, this Court should make the determination that money amounts are elements of the crime of money laundering and grant the Petition for Writ of Certiorari.

3. This Case Is An Excellent Vehicle For Considering the Question Presented.

Three aspects of this particular issue render it an excellent vehicle for determining that money amounts are elements of the Money Laundering statute.

First, this case is on direct review and Petitioner unambiguously raised this federal constitutional issue in the district court during his first re-sentencing hearing in May 2002, where it was ignored and was not decided. There is no retroactivity or other procedural impediment to this Court's consideration of the issue.

Second, the Money Laundering Statute, 18 U.S.C. §1956 contains language which implicates money amounts as being elements of the offense. Under this reading of the indictment, the failure to allege ***any amounts*** constituted the grounds for lack of jurisdiction of the court to try, convict and impose a sentence upon the Petitioner.

Third, this issue also highlights *Apprendi's* core concern that the defendant in a criminal case have the

"ability to predict with certainty the judgment from the face of the felony indictment." 530 U.S. at 478. **In addition, he should have notice of the charges he is to defend.** The significant clarification made by this Court in *Blakley,* should be further amplified by this Court's determination that all elements must be charged in the indictment and that money amounts having not been alleged in an indictment charging money laundering constitutes a violation of the Fifth and Sixth Amendment rights of this Petitioner.

This Court should grant Certiorari to resolve the question presented to protect defendants such as the Petitioner from being convicted and sentenced in violation of the Constitution.

B. The District Court's Finding of Guilt as to Count 33 Was an Amendment of the Indictment Where There Was no Allegation of an Agreement Between Coconspirators and No Testimony at Trial of an Agreement Between Unnamed Coconspirators Where the Court Found Petitioner Not Guilty of the Predicate Acts of Mail and Wire Fraud Charged in Count 33.

1. An Amendment of the Indictment Occurred in the Instant Case Warranting Reversal of Petitioner's Conviction.

This Court has long recognized the damaging effect of the modifications of the charges issued by a Grand Jury. In *Ex Parte Bain,* 121 U.S. 1 (1887) this Court stated:[8]

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[8] This portion of the holding from *Ex Parte Bain* was not overruled by *United States v. Cotton,* 535 U.S. 625 (2002) where this Court held

(Continued on following page)

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer' may be frittered away until its value is almost destroyed." 121 U.S. at 10.

This underlying principle framed in the Fifth Amendment protection was further amplified in *Bain* as follows:

> "Any other doctrine would place the rights of its citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer the indictment as thus charged, the restriction which the Constitution places upon the power of the court in regard to the prerequisite of an indictment, in reality no longer exists." 121 U.S. at 10, 13.

Almost a century later this Court in *Stirone v. United States,* 361 U.S. 212 (1960) relying upon the language from *Bain* recited above, indicated that an accused's rights are constitutionally violated when a modification occurs at

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that "insofar as it held that a defective indictment deprived a court of jurisdiction, *Bain* is overruled." 535 U.S. at 631.

trial that broadens the charges contained in an indictment. This Court in *Stirone* held that:

> "the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of ***either prosecuting attorney or judge.***" 361 U.S. at 218. (Emphasis Added).

A short two years later this Court in *Russell v. United States,* 369 U.S. 749 (1962) reaffirmed this principle relying on *Bain* and *Stirone* this Court noted:

> "A grand jury, in order to make that ultimate determination must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." 369 U.S. at 770.

The modifications to charges contained in a grand jury indictment can occur in two forms: **amendments and variances**. *United States v. Beeler,* 587 F.2d 340, 342 (6th Cir. 1978).

It is commonly understood that an amendment of an indictment occurs when the charging terms are altered, either literally or in effect, by the prosecutor or the judge after the grand jury has last passed upon them. *United States v. Barrow,* 118 F.3d 482, 488 (6th Cir. 1997).

A variance occurs when the charging terms of an indictment are left unaltered, but the evidence offered at

trial proves facts materially different from those alleged in the indictment. *United States v. Ford,* 872 F.2d 1231, 1235 (6th Cir. 1989).

Blurring the difference between amendments and variances is the concept of constructive amendments which occurs when "there has been a modification at trial in the elements of the crime charged." *United States v. Atisha,* 804 F.2d 920, 927 (6th Cir. 1986).

An amendment is considered per se prejudicial because it affects the Fifth Amendment guarantees of the accused and therefore constitutes grounds for the reversal of a judgment of conviction. *Ford, id.*

In the instant case, the language contained in Count 33 did not allege an agreement between the Petitioner and the named Defendants in the indictment. The language recited in the indictment read as follows:

> " . . . defendant Jack Rashid and defendant Jack Chilingirian, . . . did knowingly, intentionally and unlawfully combine, conspire, confederate and agree ***with other persons*** whose names are known and unknown to the Grand Jury, to conduct and cause to be conducted financial transactions, . . . which involved the proceeds of specified unlawful activity, . . . that is, mail and wire fraud . . . " (Emphasis Added) (App. 58a-59a).[9]

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[9] At trial the Government presented no testimony or evidence that established the names, dates, or factual basis for the alleged conspiracy agreement with those "known and unknown persons." There was no allegation of any conspiracy agreement between the named defendants. Such a conspiracy agreement between the Petitioner and "others" was required to be proven beyond a reasonable doubt. *United States v. Avery,* 128 F.3d 966, 971 (6th Cir. 1997).

The Petitioner contended that the trial judge acting as the trier of fact had constructively amended the indictment by virtue of his not guilty finding on the mail and wire fraud elements found in Count 33.

The Government's response before the Sixth Circuit focused on the elements of the offense of conspiracy to commit money laundering, which they indicated included:

> "(1) that there was an agreement between two or more persons to commit money laundering; and
>
> (2) that the defendant joined in the agreement knowing its purpose and with the intent to further the illegal purpose.

In support of this position the Government cited to *United States v. Threadgill,* 172 F.3d 357, 366 (5th Cir. 1999). The Government, however, stated that one additional element for establishing conspiracy to commit money laundering was required. That is, there had to be "proof that at least one of the conspirators engaged in a financial transaction with knowledge that the transaction was designed in whole or part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of specified unlawful activity" – in the underlying case, mail and wire fraud. (Government's Brief, October 3, 2000 at 23-24)[10]

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[10] To the extent that Petitioner's legal position remain consistent with the legal premise that in order to establish and prove a money laundering conspiracy, that third element which the Government suggested would not normally be required. However, the reason that it was **in fact necessary** was because the Grand Jury had recited the predicate acts of mail and wire fraud in Count 33. Thus, there was a need to include this element to establish such a conspiracy. Further, the Governments alternative position that there was no requirement that an overt act be proven to convict for a charge of conspiracy to

(Continued on following page)

Petitioner suggests that this argument is unavailing in reference to the amendment of the indictment which occurred in the instant case in two ways.

First, the district court was faced with an indictment that did ***not*** allege an agreement between the two named co-defendants who were allegedly involved in the conspiracy. An alleged agreement between "named and unnamed persons" was never established at trial. Without any allegation of an agreement or evidence of this required "agreement between conspirators" a guilty verdict was entered. This was an amendment of the indictment.

Second, and more significantly, the indictment was broadened by the trial court's acquittal of the mail and wire fraud counts which were the predicate acts of specified unlawful activity which was alleged in Count 33. The Sixth Circuit's explanation for rejecting Petitioner's argument that the indictment had been amended appears at (App. 13a) and is expressed as follows:

> "The indictment listed mail and wire fraud as the unlawful activities that generated the proceeds that Chilingirian conspired to launder. But, according to the money laundering statute, a defendant can be guilty of money laundering as long as he knew that his transactions involved proceeds of some unlawful activity – he does not have to know what form the unlawful activity

launder money, relying upon this Court's holding in *United States v. Shabani*, 513 U.S. 10, 15 (1994) where it was held that in a drug conspiracy in violation of 21 U.S.C. §846 did not require proof of an overt act to obtain a conviction. It was acknowledged that neither this Court or any other Circuit Court of Appeals had addressed and held that an overt act was required to establish a conspiracy to launder money instruments. See *United States v. Garcia-Abrego*, 141 F.3d 142, 163-64 (5th Cir. 1998), *cert. denied*, 525 U.S. 878 (1998).

> took. Therefore, while the money did have to come from the specified unlawful activity of wire and mail fraud, Chilingirian ***did not have to know that this was an element of the charged offense***. Given that Chilingirian did not have to be aware of this element, it would be illogical to conclude that Chilingirian himself actually had to have committed that unlawful activity." 280 F.3d at 712. (Emphasis Added).

This rationale is unsupported by case precedent. In addition it fundamentally overlooks the issue of what the Grand Jury considered when it executed the true bill against the Petitioner. With respect to the idea that Petitioner did not have to have knowledge of the elements of conspiracy to launder money instruments, such a premise goes contrary to the "bedrock" principles which have long been recognized and accepted as an indispensable element of proof in virtually every criminal prosecution. *United States v. Bailey,* 444 U.S. 394, 404-06 (1980).

The element of knowledge is in the Money Laundering Statute. It has long been recognized as a requirement of proof under the American system of jurisprudence. *United States v. United States Gypsum Co.,* 436 U.S. 422, 440 (1978).

It was not until the Sixth Circuit decided *United States v. Chilingirian* that this element of knowledge was dispensed with despite language in the statute to the contrary. This Court has suggested that where there is a harsh penalty attached to a violation of a particular criminal statute, (i.e., 20 years imprisonment for violating 18 U.S.C. §1956) significant consideration should be given as to whether the statute should be construed as dispensing with the knowledge element. This Court in *Staples v. United States,* 511 U.S. 600 (1994) indicated:

> "that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such case, the usual presumption that a defendant must know the facts that make his conviction illegal should apply." 511 U.S. ___, 128 L.Ed.2d at 624.

In addition to eliminating the "knowledge" element for money laundering conspiracies, the Sixth Circuit decision created a conflict in the Circuit Courts of Appeal with respect to the issue of whether the acquittal of the predicate acts of specified unlawful activity recited in an indictment is grounds for an acquittal of a money laundering charge. This Court should utilize this case as a vehicle to address the conflict between the Circuits as to this issue.

2. The Sixth Circuit Decision in *United States v. Chilingirian* Has Created a Conflict Between the Circuit Courts of Appeal Relating to the Question Presented.

The issue relating to the Circuit conflict was raised by Petitioner in a FRAP Rule 28(j) Memorandum presented to the Sixth Circuit ***prior*** to oral argument on his first direct appeal in June 2001.

In that Memorandum, Petitioner directed the panel which was to hear and decide the case to *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000). In addition, the case of *United States v. Handakas*, 286 F.3d 92 (2nd Cir. 2002) **which was decided *after*** the Sixth Circuit had decided *United States v. Chilingirian*, also supports Petitioner's position on this issue.

In *Rahseparian,* the Tenth Circuit in reversing the Defendant's money laundering conviction indicated that where a defendant (as in the similar circumstance as Chilingirian in the instant case) was not a part of the underlying illegal activity "the knowledge components of the money laundering statute collapse[s] into a single inquiry – did [the defendant] ***know that [the] funds were derived from an illegal source***?" *Rahseparian,* 231 F.3d at 1264-65 citing to *United States v. Campbell,* 977 F.2d 854, 858 (4th Cir. 1992). (Emphasis Added).

The Court in *Rahseparian,* went on to state that where a defendant is a non-participant in the fraud or conspiracy allegations, the mere fact of handling the moneys involved[11] cannot evidence any "intent to conceal" money from an illegal source if the defendant had no knowledge the money was illegally obtained in the first place. The Court in *Rahseparian,* concluded that:

> "Moreover, because the indictment in this case specifically charged that the unlawful activity underlying the money laundering count was mail fraud." The government was obligated to prove not only that [defendant] knew the money was obtained illegally, **but that it was obtained by mail fraud**. 231 F.3d at 1265. (Emphasis Added).

The rationale expressed in *Rahseparian,* would be applicable to the indictment and the allegations recited in Count 33 where the specified unlawful activity was mail and wire fraud. The Court in *Rahseparian,* in relying upon

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[11] Prior to the original sentencing in October of 1999 the district court Judge alluded to the fact that the facts of the case boiled down to what the government had characterized as "receipt and deposit" of funds which he construed to be "ministerial" money laundering.

Stirone pointed out that "it is a fundamental precept of federal constitutional law that a 'court cannot permit a defendant to be tried on charges that are not made in the indictment'" citing *Hunter v. New Mexico,* 916 F.2d 595, 598 (10th Cir. 1990) (per curiam) and *Stirone.* This is the exact circumstance which Petitioner faced in the instant case which was decided the other way by the Sixth Circuit.[12]

In *Handakas,* the Second Circuit was addressing a situation where the defendant had been convicted of conspiracy to commit mail fraud and conspiracy to launder the proceeds of mail fraud and the structuring of financial transactions to evade currency reporting laws. The defendant contended that the money laundering conviction which was based on the laundering of funds derived from the unlawful activity of mail fraud had to fall because of the unconstitutional conviction of the mail fraud count.

The Court in *Handakas,* indicated that the only predicate for the finding that the proceeds were from an illegal activity was mail fraud. Since Handakas's conviction had been reversed by the Second Circuit, the money laundering conviction had to "fall with it." 286 F.3d at 113.

Based upon the above recited cases, the Petitioners conduct would ***not*** be illegal in Oklahoma (*Rahsperian*) or

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[12] The Court in *Rahseparian,* also noted that the Government argued (as they did in the instant case) that the defendant actually committed and conspired to commit mail fraud. The conclusion was that since the evidence was insufficient to maintain a conviction for mail fraud the money laundering conviction could not stand. The premise for this determination was that there was no proof on the money laundering count imposed by the terms of the indictment which required proof of the predicate acts. 231 F.3d at 1267.

in New York (*Handakas*), but it was found to be illegal in Michigan by the Sixth Circuit in *Chilingirian*.

This Court should take this case as an appropriate vehicle to resolve the Circuit conflict as to this important legal issue.

CONCLUSION

For the above recited reasons the Petition for Writ of Certiorari should be granted.

DATED: November 10, 2004

Respectfully submitted,

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280 F.3d 704

United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America,
Plaintiff-Appellee/Cross-Appellant,
v.
Jack CHILINGIRIAN,
Defendant-Appellant/Cross-Appellee.
Nos. 99-2276, 99-2376.
Argued June 13, 2001.
Decided and Filed Feb. 13, 2002.

Jennifer J. Peregord (argued and briefed), Office of the U.S. Attorney, Detroit, MI, for Plaintiff-Appellee/Cross-Appellant in Nos. 99-2276, 99-2376.

Kenneth H. Karam (argued and briefed), Peralta, Johnston & Karam, St. Clair Shores, MI, Jack Chilingirian, McKean Federal Correctional Institution, Bradford, PA, for Defendant-Appellant/Cross Appellee in Nos. 99-2276, 99-2376.

Before: JONES, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

OPINION

NATHANIEL R. JONES, Circuit Judge.

Defendant Jack Chilingirian appeals his federal conviction and sentence on money laundering charges. On April 23, 1997, a grand jury of the Eastern District of Michigan returned a multiple count indictment against Chilingirian, an attorney, and three of his clients, Jack, Charles, and George Rashid. The Rashids were indicted on the basis of fraudulent business ventures concerning the

development, manufacture, and sale of automobile radar-braking systems to avoid collisions. At a bench trial, Chilingirian was convicted of conspiracy to commit money laundering. He was sentenced to 37 months imprisonment, two years supervised release, and restitution in the amount of $335,167.50. Chilingirian now appeals his conviction, citing inadequacies in the indictment and inconsistencies in the verdicts, and challenging the Bail Reform Act. The government cross-appeals, contending that the defendant was sentenced under the wrong guideline. We agree with the government's contention and therefore AFFIRM the defendant's conviction, but REMAND the case to permit re-sentencing under the appropriate provisions of the Sentencing Guidelines.

I. FACTS

On April 23, 1997, a grand jury in the Eastern District of Michigan returned a multiple count indictment against three brothers, Jack, Charles, and George Rashid, and their attorney, Jack Chilingirian. The indictment arose out of a scheme largely carried out by Jack and Charles Rashid to defraud investors in fraudulent business entities, based on actual or nearly-completed multi-million dollar contracts for the sale of automobile radar braking systems and related radar technology.[1]

Chilingirian served as the attorney for the Rashids and the Rashid family's company, Vehicle Radar Safety

[1] For a more detailed account of the facts regarding the Rashid investment schemes and the trials and appeals of Jack and Charles Rashid, *see United States v. Rashid*, 274 F.3d 407(6th Cir.2001). George pleaded guilty to a lesser charge and did not appeal.

Systems, Inc. ("VRSS") from 1988 or 1989 through the date of the indictment. He held a fifteen percent share in VRSS.

In 1992, Chilingirian represented VRSS when it filed a Chapter 11 bankruptcy reorganization petition, which was later converted into a Chapter 7 liquidation proceeding. During the pendency of the bankruptcy proceedings, a group of investors, referred to as the "Rudder Group," entered the picture. In August 1992, Charles Rudder met the Rashids when he was working for Gencorp Aerojet ("Aerojet"), which was discussing with VRSS the possibility of buying its radar braking technology, or perhaps the company. In December of 1992, Aerojet informed the Rashids that they would not go forward with any deals. Nevertheless, Rudder and other people who knew Chilingirian also invested in VRSS.

In early 1995, in light of the bankruptcy, the Rudders began taping telephone conversations with the Rashids and Chilingirian. In one of these conversations, Chilingirian said that he had been working on something that was going to be fabulous. Chilingirian also reassured others that he was working on several deals.

In mid-1995, Chilingirian attempted to settle all of the bankruptcy claims against VRSS and the Rashids with money available from a group of investors known as the "Tindall Group." Paul Tindall, and his wife Ann Louise, lived in Canada and were related to Jack Rashid's wife. The Tindalls met with Jack Rashid in January 1995. In late June 1995, the Rashids went to Toronto to present their technology to, and seek investments from, a group of over thirty people who learned of this opportunity through Paul Tindall.

In December 1995, Advanced Radar Systems ("ART") was incorporated in Canada in order to take in the money from the Canadian investors. Neither the Rashids nor Chilingirian informed the Canadian investors about VRSS's bankruptcy or their plan to use the investors' money to pay creditors. The Canadians invested heavily, but the money was put into VRSS. According to the government's summary, the records of Chilingirian's client trust fund show that $2.48 million in checks was given to Jack Rashid by ART-Canada investors. Chilingirian endorsed $2.267 million of those checks into his trust account. Chilingirian then wrote $275,000 worth of checks to himself, gave $1.473 million to Jack Rashid, and disbursed $480,000 to settle various investors' claims against Rashid. Aside from Peter Tindall, none of the Canadian investors have ever recouped any money invested with the Rashids.

When Chilingirian incorporated ART in Canada on behalf of Jack Rashid, he opened a new client trust account as well. According to the government, this account was used to launder money received from the last group of investors, the "Kraft Group." James Kraft was a long time friend of Jack Rashid. He was solicited for money in April 1996, and invested money from his retirement account. He also brought in contributions from over thirty other investors.

In 1996, Chilingirian and members of the Rudder Group discussed settlement of the investors' claims against the Rashids/VRSS. Some investors did get a portion of their money back, but they had to sign affidavits exculpating Jack Rashid. Similarly, despite numerous complaints from investors, Chilingirian continued to deposit money from the Kraft Group into his client trust

account, then withdraw some for Jack Rashid and a lesser amount for himself.

On April 23, 1997, Chilingirian was indicted on charges of conspiracy in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, aiding and abetting the interstate transportation of funds taken by fraud in violation of 18 U.S.C. § 2314, tampering with a witness in violation of 18 U.S.C. § 1512, and conspiracy to launder money instruments in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h).

On April 29, 1999, the district court convicted Chilingirian of conspiracy to commit money laundering. On October 8, 1999, Chilingirian filed a Motion and Brief requesting bail pending appeal. On October 18, 1999, Chilingirian's request for bail was denied and he was sentenced to 37 months imprisonment, 2 years supervised release, and restitution in the amount of $335,167.50. On appeal, Chilingirian argues that the district court's denial of his motion for bail violated his constitutional rights. He also argues that the district court's acquittal of him on certain offenses was inconsistent with the court's verdict of guilty on the conspiracy to commit money laundering charge. Further, Chilingirian alleges that certain counts within the indictment charged the same offense and, thus, the indictment was multiplicitous. On cross-appeal, the government alleges that the district court erred by sentencing Chilingirian according to the fraud guidelines.

II. STANDARD OF REVIEW

This court reviews a district court's denial of bail under an abuse of discretion standard. *Lee v. Jabe,* 989

F.2d 869, 871 (6th Cir.1993). The Bail Reform Act, 18 U.S.C. § 3143(b), creates a presumption against release pending appeal. *United States v. Vance,* 851 F.2d 166, 168 (6th Cir.1988).

This Court reviews for clear error a district court's factual findings in its application of the Sentencing Guidelines. *See United States v. Jones,* 159 F.3d 969, 980 (6th Cir.1998) (citing *United States v. Winston,* 37 F.3d 235, 240 (6th Cir.1994)). However, the district court's legal application of the guidelines is reviewed *de novo. See United States v. Moses,* 106 F.3d 1273, 1277 (6th Cir.1997). This Court reviews the question of whether there was an amendment to the indictment *de novo. United States v. Robison,* 904 F.2d 365, 368 (6th Cir.), *cert. denied,* 498 U.S. 946, 111 S.Ct. 360, 112 L.Ed.2d 323 (1990).

III. ANALYSIS

A. Bail Reform Act

The district court denied Chilingirian's motions for release on bail pending appeal. The lower court found that although the defendant did not pose a risk of flight or danger, his appellate issues were not substantial. The Supreme Court also subsequently denied Chilingirian's application for release pending bail. *Chilingirian v. United States,* 531 U.S. 1064, 121 S.Ct. 752, 148 L.Ed.2d 656 (2001).

Title 18 U.S.C. § 3143(b) [The Bail Reform Act of 1984] requires a district court to make two findings before granting bail pending appeal. To establish entitlement to release pending appeal, defendant must show 1) by clear and convincing evidence, that he is not likely to flee or pose a danger to the safety of another person or the

community, and 2) that the appeal is not for delay and raises a substantial question of law or fact likely to result in reversal, an order for new trial, or a sentence that does not include a term of imprisonment. 18 U.S.C. §§ 3143(b); *United States v. Pollard,* 778 F.2d 1177, 1181 (6th Cir.1985).[2] In this case, release on bail was denied because defendant failed to show that the appeal raised a substantial question of law.

On appeal, Chilingirian argues that 18 U.S.C. § 3143(b) violates the Due Process Clause of the Fifth Amendment and the Eighth Amendment. Chilingirian argues that denying a convicted incarcerated defendant's bail motion and forcing the defendant to wait for the hearing panel's decision is a violation of an individual's due process rights under the Fifth Amendment. In addition, he argues that denial of bail for the primary purpose of punishing the defendant is unreasonable and violates the Eighth Amendment. However, Chilingirian has not identified a single case in which any court has held that the Bail Reform Act of 1984 is unconstitutional. To the contrary, this Court and others have generally upheld the Act against constitutional challenges. For instance, in *Pollard,* this Court held that "the Bail Reform Act of 1984 does not violate a defendant's procedural due process rights by requiring the district court to determine that an appeal raises a substantial issue before granting bond pending appeal." 778 F.2d at 1182; *see also United States v.*

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[2] In addition to reversal or a new trial, the substantial question of law can be likely to result in: "(iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 1343(b).

Perry, 788 F.2d 100, 111 (3d Cir.), *cert. denied,* 479 U.S. 864, 107 S.Ct. 218, 93 L.Ed.2d 146 (1986) (federal courts that have addressed the issue have held that there is no absolute right to bail); *United States v. Portes,* 786 F.2d 758, 766 (7th Cir.1985) (neither the historical evidence nor contemporary fundamental values implicit in the criminal justice system requires recognition of the right to bail as a "basic human right," which must then be construed to be of constitutional dimensions); *United States v. Giangrosso,* 763 F.2d 849, 851 (7th Cir.1985) (holding that Bail Reform Act would not violate the Eighth Amendment and/or due process guarantees even if the standard for granting bail pending appeal involves the question of whether the lower court is likely to be reversed). We do not see any constitutional problems with this Act, and, likewise, Chilingirian has not raised any.

B. Inconsistency of Verdicts

The district court acquitted Chilingirian on all counts of the indictment except Count 33 – Conspiracy to Launder Monetary Instruments in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h). Chilingirian argues that his acquittal on the mail and wire fraud counts, and conspiracy to commit mail and wire fraud under 18 U.S.C. § 371, was inconsistent with the court's guilty verdict on Count 33. The question of whether an inconsistent verdict rendered by a judge is reviewable, or grounds for reversal or a new trial, has not been resolved in this circuit.

The Supreme Court has held that "a criminal defendant convicted by a jury on one count could not attack that conviction because it was inconsistent with the jury's

verdict of acquittal on another count." *United States v. Powell,* 469 U.S. 57, 58, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) (citing *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932)). This rule applies even where the jury acquits a defendant of a predicate felony at the same time as it convicts on the compound felony. *See id.* at 67-69, 105 S.Ct. 471.

Chilingirian, however, was tried to the bench. He argues that inconsistent verdicts rendered by a judge are reviewable as a check against arbitrary exercises of power. He relies primarily on *United States v. Maybury,* 274 F.2d 899 (2d Cir.1960), and *United States v. Duz-Mor Diagnostic Lab., Inc.,* 650 F.2d 223 (9th Cir.1981). Neither case is persuasive.

At trial, the government suggested that if Chilingirian conspired to launder money, then he also conspired to defraud. Defendant asserts that these findings are incompatible with the theory of the case and must be reconciled with the evidence presented. Consequently, he argues that the guilty verdict on the money laundering count should have been vacated and the district court should have entered his motion for acquittal on that charge.

In *Harris v. Rivera,* 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981), the Supreme Court considered the question of inconsistent verdicts rendered by a trial judge. The Court acknowledged the general rule that "[i]nconsistency in a verdict is not a sufficient reason for setting it aside" and rejected the contention that "a different rule should be applied to cases in which a judge is the finder of fact." *Id.* at 345, 102 S.Ct. 460. However, *Harris* is a case of collateral review. The defendant had been convicted in state court and had submitted a petition for a

writ of habeas corpus in federal court, arguing that his guilty verdict was inconsistent from his co-defendant's acquittal. Thus, the Court was limited to looking for a constitutional violation and specifically noted that "this case does not raise any question concerning the significance that an appellate court may attach to an apparent inconsistency in a verdict that is subject to review on direct appeal." *Id.* at 462-63.

Nonetheless, the Court's rationale that inconsistencies alone should not be the sole basis for setting aside a court's finding is still applicable here. The Court explained that inconsistent verdicts could result when:

> the judge's actual observation of everything that transpired in the courtroom created some doubt about the guilt of one defendant that he might or might not be able to articulate in a convincing manner. In this case, if the judge was convinced beyond a reasonable doubt that [two defendants] were both guilty, it would be most unfortunate if a concern about the plausibility of a lingering doubt about [a third defendant] should cause him to decide to convict all three rather than to try to articulate the basis for his doubt.

Id. at 347, 102 S.Ct. 460. Moreover, an apparent inconsistency in a trial judge's verdict does not give rise to an inference of irregularity in his finding of guilt that is sufficiently strong to overcome the presumption that the judge adhered to basic rules of procedure. *Id.*

Both prior and subsequent to *Harris*, other circuits have held that inconsistent verdicts rendered by a judge provide no greater grounds for reversal than inconsistent verdicts rendered by a jury. *See, e.g., United States v. West*, 549 F.2d 545, 553 (8th Cir.1977) ("adher[ing] to the general

rule that consistency between the verdicts on a multiple-count indictment is unnecessary when a defendant is convicted on one or more counts but acquitted on the remainder."); *United States v. Wright*, 63 F.3d 1067, 1074 (11th Cir.1995) (holding "inconsistent verdicts, whether provided by juries or judges, are not subject to reversal merely because they are inconsistent."). We agree with the reasoning of those circuits.

C. Amendment to the Indictment

Chilingirian argues that the trial court's general finding of not guilty on the mail and wire fraud counts within Count 33 renders the judge's verdict fatally defective. Specifically, he alleges that the failure to establish the elements of mail and wire fraud mandates that the verdict must be reversed because the guilty finding rests upon an impermissible amendment of the indictment. He further argues that this error gave the government a wider and unlawful berth and lessened the government's burden in establishing the act elements as charged in Count 33.

The Fifth Amendment guarantees that an accused be tried only on those offenses presented in an indictment and returned by a grand jury. U.S. Const. amend. V; *Stirone v. United States*, 361 U.S. 212, 217-19, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). "[T]he constitutional rights of an accused are violated when a modification at trial acts to broaden the charge contained in an indictment." *United States v. Ford*, 872 F.2d 1231, 1235 (6th Cir.1989). "A *variance* [to the indictment] occurs when 'the charging terms [of the indictment] are unchanged, but the evidence at trial proves facts materially different from those alleged

in the indictment.' In contrast, an *amendment* involves a change, whether literal or in effect, in the terms of the indictment." *United States v. Barrow,* 118 F.3d 482, 488 (6th Cir.1997) (emphasis added). "This Circuit has held that a variance rises to the level of a constructive amendment when the terms of an indictment are in effect altered by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *Id.; see also United States v. Atisha,* 804 F.2d 920, 927 (6th Cir.1986) (explaining that a constructive amendment occurs when "there has been a modification at trial in the elements of the crime charged"). The defendant has the burden of proof on this issue. *Barrow,* 118 F.3d at 489.

While the distinction between a variance and a constructive amendment is sketchy, the consequences of each are significantly different. A variance will not constitute reversible error unless "substantial rights" of the defendant have been affected. *United States v. Hathaway,* 798 F.2d 902, 910 (6th Cir.1986). A constructive amendment, on the other hand, is "a variance that is accorded the per se prejudicial treatment of an amendment," because, like an actual amendment, it infringes upon the Fifth Amendment's grand jury guarantee. *See Ford,* 872 F.2d at 1235. Consequently, a constructive amendment warrants reversal of a conviction. *See id.* The defendant has the burden of proving that the variance in question rose to the level of a constructive amendment. *See United States v. Blandford,* 33 F.3d 685, 701 (6th Cir.), *cert. denied,* 514 U.S. 1095, 115 S.Ct. 1821, 131 L.Ed.2d 743 (1995).

We conclude that Chilingirian's indictment was not broadened by the district court's guilty verdict on conspiracy to launder money even though there were acquittals on the fraud counts. The indictment listed mail and wire fraud as the unlawful activities that generated the proceeds that Chilingirian conspired to launder. But, according to the money laundering statute, a defendant can be guilty of money laundering as long as he knew that his transactions involved proceeds of some unlawful activity – he does not have to know what form the unlawful activity took. Therefore, while the money did have to have come from the specified unlawful activity of wire and mail fraud, Chilingirian did not have to know that this was an element of the charged offense. Given that Chilingirian did not have to be aware of this element, it would be illogical to conclude that Chilingirian himself actually had to have committed that unlawful activity.

In sum, proving that Chilingirian committed mail and wire fraud was never essential to proving that he conspired to launder money. Therefore, a conviction for the latter at the same time as an acquittal on the former did not result in an amendment to the indictment.

D. Multiplicity, double jeopardy and special findings

Chilingirian argues that Count 33 – conspiracy to commit money laundering-and Count 1 – § 371 fraud conspiracy – charged the same conspiracy, and thus the indictment was multiplicitous. A claim that an indictment is multiplicitous should be raised before trial. Fed.R.Crim.P. 12(b)(2). Chilingirian did not raise this claim until his appeal to this court. Thus, the claim made

is not timely. *See United States v. Hart,* 70 F.3d 854, 859-60 (6th Cir.1995).

Chilingirian further argues that when the court acquitted him on the § 371 conspiracy charge, the double jeopardy clause precluded the court from convicting him on the money laundering charge. The double jeopardy clause protects against successive prosecutions for the same crime and against multiple punishments for the same crime. *See Missouri v. Hunter,* 459 U.S. 359, 365, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983); *United States v. Sharpe,* 996 F.2d 125, 130 (6th Cir.1993). "[T]he protection against multiple prosecutions is not implicated when a defendant faces multiple charges in a single proceeding." *United States v. Barrett,* 933 F.2d 355, 360 (6th Cir.1991). Chilingirian was prosecuted on all of the charges in a single proceeding. He was convicted on only one count and sentenced only on that count. Thus, the double jeopardy clause is not implicated.

Finally, Chilingirian argues that his constitutional right to due process was violated by the district court's refusal to issue special findings. The court entered its general finding of not guilty on all of the counts except Count 33 on April 29, 1999. Later, on May 4, 1999, Chilingirian moved for special findings pursuant to Fed.R.Crim.P. 23. The court denied the motion because it was not made before the court entered its general finding. Rule 23 provides, "[I]n a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. . . . " Thus, the district court appropriately denied the motion. *See United States v. Gustafson,* No. 93-4247, 1994 WL 276883, at *3 (6th Cir. June 21, 1994).

E. Fraud Guideline or Money Laundering Guideline?

The government, on cross-appeal, argues that the district court erred by sentencing Chilingirian according to the fraud guidelines, rather than the money laundering guidelines. Chilingirian was found guilty of conspiracy to commit money laundering and Jack Rashid pleaded guilty to the same offense. However, Judge O'Meara sentenced the defendants according to different sentencing guidelines. He sentenced Jack Chilingirian according to the sentencing guideline for fraud (§ 2F1.1) and sentenced Jack Rashid according to the sentencing guideline for money laundering (§ 2S1.1). The fraud guideline results in a significantly lower offense level. The government argues that the court should have applied the guidelines for money laundering to Chilingirian.

This is a case of first impression in this circuit. Chilingirian and the district court rely on case law from the Third Circuit. In *United States v. Smith,* 186 F.3d 290 (3d Cir.1999), the Third Circuit held that the money laundering guidelines were too harsh to apply to what it described as a routine fraud case in which the money laundering activity was an "incidental by-product" of a kick-back scheme. *Id.* at 300. The court explained that the sentencing court must perform a "heartland" analysis when deciding what guideline should be applied and when deciding whether to depart. *See id.* at 298. Thus, in order to determine whether the money laundering guideline should apply, the court had to determine what conduct was considered by the Sentencing Commission to fall within the heartland cases covered under the money laundering guideline. The court considered the Sentencing Commission's proposed amendments to the money laundering

guideline, which were rejected by Congress, and "conclude[d] that the Sentencing Commission itself has indicated that the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime." *Id.* at 300.

The Third Circuit has since clarified the holding of *Smith:*

> Where money laundering is not 'minimal or incidental,' and is 'separate from the underlying crime' and intended to 'make it appear that the funds were legitimate' or to funnel money into further criminal activities, § 2S1.1 is an applicable guideline. The guideline may also be applicable if there is evidence that the activities which fulfilled the broad statutory requirements for money laundering were extensive with drug trafficking or other serious crime.

United States v. Mustafa, 238 F.3d 485, 495 (3d Cir.2001) (quoting *United States v. Bockius,* 228 F.3d 305, 313 (3d Cir.2000)). In this case, it could also be argued that even if this Circuit were to apply *Smith,* its rationale would fail to produce the result desired by Chilingirian. The money laundering in this case was not minimal nor incidental, and it appears to have been funneled through the client trust account in order to make it appear legitimate and to further the radar technology/fraud scheme.

The Third Circuit relied on U.S.S.G. Appendix A (1999), which states "[i]f, in an atypical case, the guideline section indicated for the statute of conviction is inappropriate because of the particular conduct involved, use the guideline section most applicable to the nature of the offense conduct charged in the count of which the defendant was convicted." Similarly, this court has previously

relied on this language and held that the district court must decide which guideline is most applicable considering the facts involved. *See United States v. Hood,* 210 F.3d 660, 664 (6th Cir.2000).

This portion of the Guidelines Manual has since been amended so that the sentencing court is now required to use the guideline that Appendix A says is applicable. *See* U.S.S.G., Appendix A (2000). Thus, the *Smith* approach is no longer relevant.

Whether this court views the district court's action as a choice between guidelines or a departure, the result is the same. The heartland analysis that should be applied prior to determining which guideline applies is identical to the analysis that should be applied in determining whether a departure is warranted. *See Smith,* 186 F.3d at 298. Moreover, in the departure context, this court has held that the fact that a money laundering offense involved proceeds related to unlawful activity other than drug trafficking or organized crime is not sufficient to take the offense outside of the heartland of the money laundering guideline. *United States v. Reed,* 167 F.3d 984, 995 (6th Cir.1999); *United States v. Ford,* 184 F.3d 566, 587 (6th Cir.1999). Thus, even if the district court's decision is treated not as a departure but as an application of a more appropriate guideline, the district court's rationale was not sufficient to warrant the lower court's decision not to apply the money laundering guideline to the money laundering offense. Accordingly, the district court's sentence should be reversed and remanded with instructions to re-sentence Chilingirian in accordance with the money laundering guideline.

IV. CONCLUSION

For the reasons stated above, we REVERSE the district court's sentencing order and REMAND the case to the district court with instructions to re-sentence Jack Chilingirian in accordance with the money laundering guideline. We AFFIRM the remainder of the district court's judgment.

NOT FOR PUBLICATION

No. 02-1695

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN**
Plaintiff-Appellee,	
v.	
JACK C. CHILINGIRIAN,	(Filed Apr. 9, 2004)
Defendant-Appellant.	

BEFORE: SUHRHEINRICH and CLAY, Circuit Judges; and GWIN, District Judge.*

SUHRHEINRICH, J. Defendant-Appellant Jack Chilingirian ("Defendant") appeals from his resentencing upon remand. In this appeal he challenges the eighty-seven month sentence imposed. For the reasons that follow, we reverse and remand.

I. Background

The case was previously heard in this Court and remanded for resentencing. *See United States v. Chilingirian*, 280 F.3d 704 (6th Cir. 2002). We incorporate the facts of the case by reference here, and supplement as necessary.

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

On April 29, 1999, after a bench trial, the district court found Defendant guilty as to one count of conspiracy to launder monetary instruments in violation of 18 U.S.C. § 1956(a) & (h) ("Count 33").[1] The presentence report ("PSR") used the money laundering guideline, U.S.S.G. § 2S1.1 (1998), which called for a base offense level of 23, plus five levels as the value exceeded $1,000,000.00. With a total offense level of 28 and a Criminal History Category I, the PSR recommended a guideline range of seventy-eight to ninety-seven months. Instead, the district court used the fraud guideline, U.S.S.G. § 2F1.1, and calculated

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[1] Count 33 of the Third Superseding Indictment provides as follows:

COUNT THIRTY THREE

(18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS)

. . .

That from in or about December of 1994 through in or about October of 1996, in the Eastern District of Michigan, Southern Division, and elsewhere, defendant **Jack Rashid** and defendant **Jack Chilingirian**, knowing that the property involved represented the proceeds of some form of unlawful activity, as defined in Title 18, United States Code, Section 1956(c)(1), did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with other persons whose names are known and unknown to the Grand Jury, to conduct and cause to be conducted financial transactions affecting interstate and foreign commerce which involved the proceeds of specified unlawful activity, that is, mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, with the intent to promote the carrying on of specified unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of such unlawful activity; all in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h).

. . . .

All in violation of Title 18, United States Code, Section 1956(h).

(emphasis in original).

a total offense level of 20 and Criminal History Category I, which resulted in a guideline range of thirty-three to forty-one months. The district court imposed a term of thirty-seven months' imprisonment, two years of supervised release, and restitution in the amount $335,167.50. Defendant appealed on various grounds. The Government filed a cross-appeal, challenging the district court's use of the fraud guideline, U.S.S.G. § 2F1.1, instead of the sentencing guideline for money laundering, § 2S1.1. This Court rejected Defendant's challenges to his conviction and sentence. However, regarding the cross-appeal, we determined that money laundering guidelines should have been used in imposing sentence in light of the fact that "[t]he money laundering in this case was not minimal nor incidental, and it appears to have been funneled through the client trust account in order to make it appear legitimate and to further the radar technology/fraud scheme." *Chilingirian,* 280 F.3d at 714. We remanded with instructions to resentence Defendant in accordance with the money laundering guideline. *Id.*

On April 9, 2002, after remand, the probation office supplemented the original presentence report ("SPSR"). The SPSR noted that, on remand, the first task was to determine which version of the guidelines to apply. The SPSR noted that the last date of the offense of conviction is the controlling date for *ex post facto* purposes. *See* U.S.S.G. § 1B1.11 (providing that the district court shall use the Guidelines Manual in effect on the date the defendant is sentenced, unless its application would violate the *ex post facto* clause, in which case the last date of the offense of conviction is controlling). Here, the offense conduct for Count 33 ended in October 1996, thus the 1995 edition of the Guidelines Manual and the 2001 version

would be the two applicable versions. The SPSR calculated Defendant's sentence under both editions. The SPSR calculated a total offense level of 29 under § 2S1.1 of the 1995 guidelines, and a total offense level of 32 under § 2S1.1 of the 2001 version. Because it produced a more favorable guideline level, the SPSR used the 1995 guideline. Thus, with a total offense level of 29 and a Criminal History Category I, the guideline range was eighty-seven to one hundred eight months.

Defendant filed objections to the SPSR. The district court held a resentencing hearing on May 23, 2002. Over Defendant's objection, the court applied the 1995 version of the guidelines.

The district court next ruled that the amount of laundered funds was $2.7 million. The court also rejected Defendant's attack on the restitution order. The court set the total offense level at 29. Combined with a Criminal History Category score of I, the guideline range was eighty-seven to one hundred-eight months. The district court resentenced Defendant to a custodial term of eighty-seven months, all other terms to remain unchanged from the original judgment. Defendant filed his *pro se* notice of appeal.

Defendant, represented by counsel, presents three issues on appeal: (1) whether Defendant's statutory sentence of eighty-seven months violates *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Ring v. Arizona,* 536 U.S. 584 (2002); (2) whether the district court erred in calculating Defendant's sentence; and (3) whether the district court erred in requiring Defendant to pay restitution.

II. Analysis

A. *Apprendi*

The gist of Defendant's first argument is as follows. The offense-defining statute, 18 U.S.C. § 1956, has a maximum sentence of twenty years. However, the operation of the offense-defining statute in conjunction with § 2S1.1 of the sentencing guidelines results in a relevant maximum sentence of twelve months. The guidelines must be considered in determining the relevant maximum sentence because 18 U.S.C. § 3553(a)(4)(A) mandates the application of the sentencing guidelines. In other words, every factor which increases a defendant's sentence, including the application of the guideline sentencing enhancements, must be charged in the indictment and proven to a jury beyond a reasonable doubt.

In *Apprendi,* the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory *maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490 (emphasis added). In *Harris v. United States,* 536 U.S. 545 (2000), the Supreme Court held that anything that increases the statutory *minimum* is a sentencing factor and not an element, and not subject to the rule of *Apprendi.* The majority in *Harris* stated in relevant part:

> [w]hether chosen by the judge or the legislature, the facts guiding judicial discretion *below the statutory maximum* need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already

> have found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries – and without contradicting *Apprendi*.

Id. at 565 (emphasis added).

Relying on *Harris*, this Court has already ruled *Apprendi* does not apply to sentencing enhancements within the guideline range. *United States v. Stines*, 313 F.3d 912, 916 (6th Cir. 2002) (stating that "[a]lthough it is true that the quantity determined by the district court elevated the mandatory guideline minimum sentence, *Harris* tells us that *Apprendi* does not invalidate that increase"; holding that sentencing enhancements based on drug type and quantity factors did not affect the statutory maximum and therefore *Apprendi* was not implicated); *see also United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2002) (same); *United States v. Wilson*, 249 F.3d 366, 380 (5th Cir. 2001) (rejecting the defendant money-launderer's argument that [illegible] enhancement under the money laundering guideline based on the value of funds laundered must be submitted to the jury; upholding the twenty-year sentence imposed by the district court).

Ring, issued the same day as *Harris*, does not support Defendant's argument. *Ring* was a capital sentencing case. The Arizona statute made first degree murder punishable by life imprisonment or death. However, the death penalty could be imposed only in accordance with a separate state statute which required further fact findings to be made by the judge alone. The Supreme Court held that, because the aggravating factors increased the available sentence from life in prison to death, they could not be found by the trial

judge but had to be determined by the jury. *Ring*, 536 U.S. at 609. *Ring* is therefore distinguishable.

In short, this contention is without merit.

B. Sentence Calculation

Defendant argues in the alternative that the district court miscalculated his offense level under both the 1995 and 2001 Guidelines. Specifically, Defendant argues that his guideline range, rather than being computed at level 29 under the 1995 version, or 32 under the 2001 version, should have been calculated at level 26 under both versions. He makes several arguments in support of each.

1. 1995 Guidelines

As noted, Defendant claims that his total offense level under the 1995 guideline should have been 26, not 29, because his conviction should be construed as a *conspiracy* to commit money laundering under 18 U.S.C. § 1956(h), not the *substantive* offense of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i). Defendant therefore claims that the district court should have applied § 2S1.1(a)(2) for a base level of 20 for other violations of 18 U.S.C. § 1956, because he was found guilty only of conspiracy to launder monetary instruments, in violation of 18 U.S.C. § 1956(h). Instead, the district court determined Defendant's base offense level by applying § 2S1.1(a)(1).

The 1995 version provides in relevant part as follows:

(a) Base Offense Level:

(1) 23, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);

(2) 20, otherwise.

(b) . . .

. . .

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

Value (Apply the greatest)	Increase in Level
. . .	
(F) More than $1,000,000	add 5
(G) More than $3,500,000	add 6

. . .

U.S.S.G. § 2S1.1 (1995).

We find no error. Under § 1956(h), "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C.A. § 1956(h) (West 2003). Thus, in determining Defendant's sentence, we look to the object offense and use its base offense level. *See United States v. Haehle*, 227 F.3d 857, 862 (7th Cir. 2000) (stating that "for a person who conspires to violate § 1956(a)(1)(A), the sentence under § 1956(h) must be the same as for the person who commits the substantive offense"; similarly, "[f]or a person who conspires to violate § 1956(a)(1)(B), the sentence follows that substantive offense"); *see also id.* at 861-62 (rejecting the defendant's argument that the use of level 23 was wrong because he pleaded guilty to a violation of § 1956(h), not § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A)).

Count 33 explicitly charged Defendant and Jack Rashid with engaging in a conspiracy to both promote and conceal the proceeds of their fraudulent radar technology

scheme through the use of client trust accounts established by Defendant for this purpose. The indictment twice specifically referenced "Title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h)." In its "General Finding Pursuant to Rule 23," the district court specifically found Defendant guilty of the charge of "COUNT THIRTY-THREE (18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS)." The amended judgment states that Defendant was found guilty of "18 USC 1956(a)(1)(A)(I), 1956(a)(1)(B)(I), and 1956(h)." Finally, at resentencing, the district court specifically noted that "[o]n April 29, 1999, the Court issued a general finding pursuant to Rule 23 finding the defendant guilty of Count 33, alleging a violation of – the following sections of – 18 U.S.C. 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h)." Thus, the district court correctly looked to § 1956(a)(1)(A)(i) and § 1956(a)(1)(B)(i), the object offenses of the conspiracy count in determining the base offense level for Defendant's conviction under § 1956(h).

The district court also did not err in using the base offense level of 23 set forth in § 2S1.1(a)(1), based on the violation of § 1956(a)(1)(A)(i), rather than the base offense level of 20 under § 2S1.1(a)(2), based on the violation of § 1956(a)(1)(B)(i). Section 1B1.2(d) states that "a conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit." U.S.S.G. § 1B1.2(d) (1995). The commentary explains that

> [s]ubsection (d) provides that a conviction on a conspiracy count charging conspiracy to commit

> more than one offense is treated as if the defendant had been convicted of a separate conspiracy for each offense that he conspired to commit. For example, where a conviction on a single count of conspiracy establishes that the defendant conspired to commit three robberies, the guidelines are to be applied as if the defendant had been convicted on one count of conspiracy to commit the first robbery, one count of conspiracy to commit the second robbery, and one count of conspiracy to commit the third robbery.

U.S.S.G. § 1B1.2, cmt. n.4 (1995).[2]

Thus, here, for sentencing purposes it was proper to treat Defendant as having been convicted of one count of conspiracy to commit a violation of § 1956(a)(1)(A)(i), and one count of conspiracy to commit a violation of § 1956(a)(1)(B)(i). Next, U.S.S.G. § 3D1.2(d) directs that we group together the "two counts." U.S.S.G. § 3D1.2(d) (stating that "[o]ffenses covered by [§ 2S1.1] are to be

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[2] Further support for this result derives from Application note 5 to § 1B1.2, which states that Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. *In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense.*

U.S.S.G. § 1B1.2, cmt. n.5 (1995) (emphasis added). *See United States v. Tocco*, 306 F.3d 279, 292-93 (6th Cir. 2002) (remanding for district court to determine whether acts of extortion alleged in connection with conspiracy conviction were relevant conduct; noting that § 1B1.2(d), cmt. n.5 was the applicable guideline given the jury verdict in the case), *cert. denied*, 123 S. Ct. 2573 (2003).

Here, the district court convicted Defendant of the object offense of § 1956(a)(1)(A)(i).

grouped under this subsection"). *See also* U.S.S.G. § 3D1.2, cmt. n.6 (stating that "[a] conspiracy . . . to commit an offense is covered under subsection (d) if the offense that is the object of the conspiracy . . . is covered under subsection (d)"). *See generally* U.S.S.G. ch 3, pt. D, introductory cmt. (1995) (stating that "[t]he rules in this Part are to be used to determine the offense level for such composite offenses [e.g. conspiracy] from the offense level for the underlying offenses"). Finally, U.S.S.G. § 3D1.3 directs that "[i]n the case of counts grouped together pursuant to § 3D1.2(d) . . . [w]hen the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level." U.S.S.G. § 3D1.2(b) (1995). Here, the highest offense level is 23. In sum, the district court did not err in setting Defendant's base offense level at 23 rather than 20.

Defendant also asserts that Count 33 cannot be construed to charge substantive money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) because it fails to describe sufficiently conduct that would constitute such a violation. He adds that the three paragraphs of that count parrot the language of 18 U.S.C. §§ 1956(a)(1)(A)(i) and (B)(i), without providing any reference to specific conduct by the defendants that would constitute violations of those provisions. Thus, he claims that this paragraph is insufficient to charge a violation of any part of 18 U.S.C. § 1956 because it fails to apprise him of the underlying conduct. In addition, Defendant argues that Count 33, as a single count, cannot constitutionally charge both violations of the substantive crime of money laundering *and* conspiracy to commit money laundering.

As the Government points out, the foregoing arguments are veiled attempts at arguing vagueness and

duplicity in the indictment, and should have been raised in pretrial motions rather than as sentencing issues. *See* Fed. R. Crim. P. 12(b)(3)(B); *United States v. Adesida,* 129 F.3d 846, 849 (6th Cir. 997) (holding that duplicity must be raised prior to trial or waived).

2. 2001 Guidelines

Defendant also claims that the district court miscalculated his sentence under the 2001 sentencing guidelines, to arrive at a total offense level of 32, rather than 26. He finds several errors. First, he contends that the district court calculated his base offense level under the wrong guideline because it erroneously found him responsible for the underlying mail and wire fraud. Second, he argues that the district court made a new, higher loss calculation than utilized at his initial sentencing, without any evidence to support the change. Third, he asserts that the district court erred in applying an enhancement for making a false statement during the course of a bankruptcy proceeding.

The 2001 version of § 2S.1.1(a) states:

> (a) Base Offense Level:
>
> > (1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of § 1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

U.S.S.G. § 2S1.1(a) (2001).

a. Relevant Conduct

At resentencing, over Defendant's objection, the district court sentenced Defendant under § 2S1.1(a)(1), reasoning that Defendant was responsible for the underlying mail and wire fraud under the Relevant Conduct provision, § 1B1.3(a)(1)(A). Defendant contends that the district court failed to make sufficient findings to hold him responsible for the underlying offense and thus application of § 2S1.1(a)(1) is unsupported by the record. Thus, Defendant claims that his base offense level should have been calculated under § 2S1.1(a)(2).

The SPSR noted that the underlying offense from which the laundered funds were derived is fraud. Stating that Defendant "committed the underlying offense or would be accountable for the underlying offense under the relevant conduct provisions of § 1B1.3(a)(1)(A)," the SPSR applied § 2S1.1(a)(1). Under the fraud guidelines, § 2B1.1, the base level is 6, plus eighteen levels for more than $2,500,000 in funds, § 2B1.1(b)(1)(J), plus four levels for more than fifty victims, § 2B1.1(b)(2)(B), and two levels as the offense involved a misrepresentation during the course of a bankruptcy proceedings, § 2B1.1(b)(7)(B). This resulted in a total offense level of 30. Because Defendant was convicted under § 1956(h), an additional two points were added, resulting in a base offense level of 32. *See id.*

Had Defendant been sentenced under § 2S1.1(a)(2), his base offense level would be 8, plus 18 for the value of funds involved, § 2B1.1(b)(1)(J), plus two more levels under § 2S1.1(b)(2)(B) because Defendant was convicted under 18 U.S.C. § 1956(h). This would set his total offense level at 28, with a corresponding sentencing range of seventy-eight to ninety-seven months. U.S.S.G., Ch. 5, Pt. A (2001). Thus, the sentencing range would be lower than that obtained under the 1995 version, and it would be possible for Defendant to receive less than eighty-seven months, his current sentence.

Section 1B1.3(a)(1)(A) makes a defendant accountable for "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." At the time of Defendant's resentencing, Fed. R. Crim. P. 32(c)(1) provided that "[a]t the sentencing hearing . . . [f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." Fed. R. Crim. P. 32(c)(1).[3] This

[3] On December 1, 2002, amendments to the Federal Rules of Criminal Procedure replaced Rule 32(c)(1) with Rule 32(i)(3). Rule 32(i)(3)(B) states that "for any disputed portion of the presentence report or other controverted matter" during sentencing, the court must "rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3) (2003). "This new rule attempts to address confusion in the courts over whether, under the prior rule, they were required to make rulings on every objection to the presentence report or only those that potentially would affect the sentence." *United States v. Treadway*, 328 F.3d 878, 885 n.3 (6th Cir. 2003) (citing advisory committee's notes to Fed. R. Crim. P. 32(i)(3)), *cert. denied*, 124 S. Ct. 166 (2003). Prior to these revisions, the Sixth Circuit had interpreted the rule in a manner consistent with Rule

(Continued on following page)

Court requires sentencing courts to make independent findings on any controverted matters. *United States v. Tackett,* 113 F.3d 603, 613 (6th Cir. 1997). This Court requires "'literal compliance' with this provision." *Id.* When the district court fails to make a factual finding, "this court must remand for resentencing." *United States v. Edgecomb,* 910 F.2d 1309, 1313 (6th Cir. 1990).

In response to Defendant's objection, the district court ruled as follows:

> Objection 5 of the defendant is overruled on the law. And I make as to objection 5 the following comment. As the defendant was involved in the underlying offense and the facts in this case show that he either committed, aided or abetted, counseled, commanded, induced, procured, or wilfully caused the underlying offense, guideline of Section 2S1.1(a)(2) cannot be utilized in setting the base offense level.

The Government claims that the record supports sentencing Defendant under § 2S1.1(a)(1) as a direct money launderer for purposes of calculating his offense level under the 2001 guidelines. However, the district court's conclusory statement fails to meet Rule 32's requirement of independent or particularized findings of fact. *See United States v. Osborne,* 291 F.3d 908, 911-12 (6th Cir. 2002) (district court's summary acceptance of presentence report was insufficient to dispose of the defendant's challenge to presentence report's finding holding him responsible for a specified amount of methamphetamine); *United States v. Corrado,* 227 F.3d

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32(i)(3)'s clarification. *United States v. Darwich,* 337 F.3d 645, 666 (6th Cir. 2003).

528, 540-41 (6th Cir. 2000) (holding that district court erred in failing to set out findings as to any of the controverted issues; noting that the district court "either summarily adopted the findings of the presentence report or simply declared that the enhancement in question was supported by a preponderance of the evidence"); *Tackett,* 113 F.3d at 614 (holding that mere recitation of the presentence investigation report's findings does not satisfy Rule 32 and that the record must reflect an independent evaluation of the evidence). Upon remand, the district court will have to conform its ruling on this aspect of its sentencing calculation to the dictates of Rule 32 and our caselaw.

b. Amount of Funds

Next, Defendant argues that the district court erred in setting the value of funds at $2.7 million under the 2001 guidelines at resentencing. At the initial sentencing the Government alleged, and the district court found, that Defendant was responsible for $2.267 million in laundered funds. Defendant alleges that this Court's earlier remand for resentencing was not a general remand. Second, he argues that the sentencing court failed to provide objective reasons for imposing a more stringent sentence at resentencing, without providing an objective basis for doing so.

Under the 1995 version of the guideline, a specific-offense enhancement of six is required where the amount of laundered funds is between $2 million and $3.5 million. U.S.S.G. § 2S1.1(b)(2)(G) (1995). Thus, the precise amount of the funds in excess of $2 million was not relevant. However, under the 2001 money laundering guideline, the cross-reference to the calculations set forth in § 2B1.1 now

contains a break between $1 million (sixteen-level increase) and $2.5 million (eighteen-level increase). Thus, the Government filed a resentencing memorandum, with exhibits, establishing the total amount of money laundered through both of Defendant's trust accounts as totaling over $2.7 million.[4]

Even if we consider the issue, Defendant's claim should fail. To begin, our remand order simply states that "we **REVERSE** the district court's sentencing order and **REMAND** the case to the district court with instructions to re-sentence Jack Chilingirian in accordance with the money laundering guideline." *Chilingirian,* 280 F.3d at 714 (emphasis in original). In *United States v. Helton,* 349 F.3d 295 (6th Cir. 2003), we held that "[w]here [ ] 'an appellate court simply vacates a sentence and remands to the district court for 'resentencing, that order is considered a general one that allows the district court to resentence the defendant *de novo.*'" *Id.* at 299 (citations omitted). Further, even if it is deemed "a remand order that is limited by its terms to a discrete issue [and] the district court obtains jurisdiction to address only that issue," the "discrete" issue is proper application of the money laundering guidelines, of which the amount of funds is a component. *Id.* Defendant's argument is without merit.

We note that Fed. R. Crim. P. 32(c)(1) (now, Fed. R. Crim. P. 32(i)(3)(B)) requires that for any controverted issue, the district court make specific factual findings to support its conclusion. Here, the court satisfied this

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[4] It does not appear that Defendant actually challenges the $2.7 million dollar figure.

requirement. At the resentencing hearing, the district judge made the following findings of fact:

> The majority of the funds that the defendant is being held accountable for comes from the first client trust fund. The review of funds show payments of 345 thousand and some odd dollars to the defendant, $1,788,000 and some odd dollars to Jack Rashid, and 600 thousand and some odd dollars related to Rashid brought, for a total of two thousand – 2,736,052.

Defendant also argues that the district court was required to provide objective reasons for the increase in his sentence upon remand, citing *North Carolina v. Pearce,* 395 U.S. 711 (1969), *overruled on other grounds by Alabama v. Smith,* 490 U.S. 794 (1989). The district judge complied with this requirement, by citing objective information, such as the fact that co-conspirator Jack Rashid was found guilty of laundering $2.7 million. Also, on remand, the Government submitted a memorandum with a detailed financial spreadsheet supporting the higher figure. The district court clearly stated its reasons for the higher figure, and these reasons have objective support in the record.

c. False Statement

Defendant argues that the district court erred in applying a two-level enhancement for misrepresentation or fraudulent action made in the course of a bankruptcy proceeding under U.S.S.G. § 2B1.1(b)(7)(B) (2001). He argues that the district court did not apply the enhancement at the initial sentencing and therefore cannot apply it at resentencing. The offense level enhancement for misrepresentation

during a bankruptcy proceeding, U.S.S.G. § 2B1.1(b)(7)(B), did not exist until November 1, 2001.[5]

In the re-sentencing remand in 2002, Defendant never objected to the enhancement, before the district court. Under plain error review, it is not clear and obvious that the enhancement was erroneous. Defendant also attempts to invoke the *Pearce* requirement that the judge must cite objective reasons for increasing the sentence on remand. But it is not clear and obvious that this requirement applies in a case, such as the present one, where a defendant's appeal failed and the remand was granted solely on the basis of a successful cross-appeal by the government. *See Pearce,* 395 U.S. at 725 ("Due process of law, then, requires the *vindictiveness against a defendant for having successfully attacked his first conviction* must play no part in the sentence he receives after a new trial.") (emphasis added).[6]

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[5] Even though the enhancement was enacted after the offense was committed, Defendant did not make an *ex post facto* argument before this Court or the district court. Thus, even if, *arguendo,* this Court could consider the *ex post facto* issue, review would be under the plain error standard, which requires a clear and obvious error that affects substantial rights. *United States v. Clinton,* 338 F.3d 483, 487 (6th Cir. 2003). As stated in *United States v. Monus,* 356 F.3d 714, 718 (6th Cir. 2004), "clarifications of the guidelines have retroactive application while substantive changes do not." (citation omitted). It is not clear and obvious that § 2B1.1(b)(7)(B) constitutes a substantive change, as opposed to a mere clarification, of the prior U.S.S.G. § 2F1.1(b)(3)(B). There is no clear and obvious *ex post facto* violation.

[6] Although the *Pearce* language refers only to successful attacks to convictions, the *Pearce* requirement of objective reasons also applies to re-sentencing. *United States v. Flood,* 965 F.2d 505, 513 (7th Cir. 1992). But, as explained, it is not clear and obvious that the requirement would apply where, as here, Defendant's appeal of the sentence had failed.

C. Restitution

Defendant argues that the district court erred in imposing restitution in the amount of $335,167.50. The Government counters that Defendant waived the issue because he did not raise this objection at the time of his first sentencing in 1999.

Although the transcript of the original sentencing hearing does not reflect an explicit objection to the order of restitution, the Addendum to the Presentence Investigation Report filed on October 13, 1999, reveals that Defendant actually objected to the *amount* of restitution, claiming that it was "inaccurate."[7] On the other hand, at the original sentencing, defense counsel contended that "the correct amount of restitution in this case is $335,167.50" which represented only "checks that were issued from [Chilingirian's] trust account to [Chilingirian] personally." The district court assessed restitution in the same amount. Defendant did not challenge this amount on direct appeal. Having forfeited the claim in the previous appeal, it is not cognizable now. *See United States v. McKinley,* 227 F.3d 716, 718-19 (6th Cir. 2000); *cf. United States v. Hebeka,* 89 F.3d 279, 284-85 (6th Cir. 1996).

III. Conclusion

For the foregoing reasons, we **REVERSE** the district court's sentencing order and **REMAND** the case to the district court for the limited purpose of recalculating

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[7] Defendant also objected to the restitution order in briefs submitted to the court before resentencing. (Pro Se Motion by Chilingirian for Judgment of Acquittal, dated March 15, 2002, at 15).

Defendant's sentence under the 2001 version of the guidelines in accordance with this opinion. If that calculation results in a lower total offense level than the current calculation under the 1995 version, the district court is further instructed to resentence Defendant in accordance with the 2001 guideline. Otherwise, Defendant should be resentenced under the 1995 version. **SO ORDERED**.

GWIN, J., CONCURRING. I agree with the majority's disposition of this case and the lion's share of its reasoning. However, I write separately to explain why an apparent inequity of our decision is actually a mirage. First, the apparent inequity: Our decision permits the Government to challenge the district court's initial value of funds determination on remand, though the Government did not previously make the challenge, but forbids Chilingirian from challenging the district court's restitution order on remand. The majority does not address exactly why this apparently inequitable result is, in fact, correct. I explain the justification here.

We conclude that Chilingirian waived his challenge to the restitution order by not raising it in his initial appeal. This conclusion is correct. Our circuit's case law has identified "the general rule that when a party fails to seek review of a district court's final order, it is barred from reasserting that issue in any subsequent appeals occurring in that case." *United States v. McKinley,* 227 F.3d 716, 718 (6th Cir.2000). If this is correct, though, then why did the government not waive its challenge to the amount of funds involved?

United States v. Hebeka, 89 F.3d 279 (6th Cir. 1996), provides the answer. Under *Hebeka,* the *McKinley* rule does not apply where a party asserts on appeal an

argument that (1) the party had been unable to pursue during a previous appeal, but (2) later becomes logically relevant. *Id.* at 284-85. In this case, the district court applied the 1995 Guidelines during the original sentencing proceedings. These guidelines contain "breaks" in the value of funds determination at $2 million and $3.5 million. *See* USSG § 2S1.1(b)(2)(G)-(H) (1995). Any figure between these two breaks results in the same enhancement. For this reason, the Government lacked a ground to argue on appeal that the $2.267 million figure was inaccurate; even if this Court agreed, the additional funds included in the finding would have made no difference under the 1995 Guidelines. Thus, it was irrelevant under the 1995 Guidelines whether the correct value of funds was $2.267 million or $2.7 million.

On resentencing, however, the district court considered both the 1995 and 2001 Guidelines. The 2001 Guidelines contain a sentencing break at $2.5 million. *See* USSG § 2B1.1(b)(1)(J) (2002). The changes in the Guidelines made the difference between $2.267 million and $2.7 million relevant – the $2.267 million figure would result in a 16-level enhancement, whereas the $2.7 million figure would result in an 18-level enhancement. This new relevance, under *Hebeka*, prevents the *McKinley* waiver rule from applying in this case.

This result applies just the same if the tables were turned. Had the district court originally found the value of funds to be $2.7 million, *Hebeka* would permit Chilingirian to advocate for a figure of $2.267 million on this appeal. Therefore, the previously described "apparent inequity" is really no inequity at all, and need not cause any dyspepsia to readers or future defendants.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	CRIMINAL NO. 96-80670
Plaintiff,	HON. JOHN CORBETT O'MEARA
-vs-	VIO:
D-1 JACK RASHID,	18 U.S.C. § 371
D-2 CHARLES RASHID,	18 U.S.C. § 982
D-3 JACK CHILINGIRIAN,	18 U.S.C. §§ 1341, 2
	18 U.S.C. §§ 1343, 2
Defendants.	18 U.S.C. § 1512
	18 U.S.C. § 1956
	18 U.S.C. § 1957
/	18 U.S.C. §§ 2314, 2

THIRD SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

GENERAL ALLEGATIONS

At all times pertinent to this indictment:

a. **Jack Rashid** and **Charles Rashid**, defendants herein, were corporate officers of Vehicle Radar Safety Systems, Inc. (VRSS), a company allegedly involved in the distribution of radar braking systems for use in automobiles and other forms of transportation. VRSS was located at 10 South Gratiot, Mr. Clemens, Michigan.

b. VRSS declared bankruptcy in January 1992. On or about August 29, 1994, the bankruptcy was converted to a Chapter 7 (liquidation) matter. The bankruptcy of VRSS was settled in December 1995.

c. After VRSS went bankrupt, **Jack Rashid** and **Charles Rashid** started a successor company called Advanced Radar Technologies, Inc. (ART). ART was incorporated on or about December 14, 1995, with facilities at 33272 Groesbeck, Fraser, Michigan. Like VRSS, ART was allegedly formed to "manufacture, distribute, market and sell collision warning systems and auto related electronic equipment."

d. **Jack Chilingirian**, defendant herein, is a lawyer who represented the **Rashids**, personally, and also represented the **Rashids'** corporate entities, VRSS, and ART. **Chilingirian** represented VRSS during its bankruptcy proceedings, and later represented ART, as well as **Jack Rashid**, in dealing with individuals who had provided funds to the **Rashids** and in developing ART's business. The incorporation records for ART list **Jack Rashid** as the incorporator and **Jack Chilingirian** as the resident agent.

e. Advanced Radar Technologies of Canada (ART-Canada) was incorporated on or about September 1, 1995, allegedly in order to facilitate investments from citizens of Canada in the radar technology held by ART and ART-Canada; **Jack Rashid** is the president and sole shareholder of ART-Canada.

COUNT ONE
(18 U.S.C. § 371 – CONSPIRACY)

D-1 JACK RASHID
D-2 CHARLES RASHID
D-3 JACK CHILINGIRIAN

1. The General Allegations are incorporated herein by reference.

2. That from approximately 1988 through approximately April 1997, in the Eastern District of Michigan, Southern Division, and elsewhere, **Jack Rashid**, **Charles Rashid**, and **Jack Chilingirian**, defendants herein, in part through the corporations Advanced Radar Technologies, Inc. (ART), Vehicle Radar Safety Systems, Inc. (VRSS), and Advanced Radar Technologies of Canada (ART-Canada), and with others known and unknown to the grand jury, did knowingly and willfully conspire and agree with each other to commit offenses against the United States, that is, to cause interstate and foreign wire communications and the use of the United States mails and interstate and foreign couriers, in the execution of a scheme to defraud and to obtain money and other things of value on the basis of false and fraudulent pretenses and representations, in violation of Title 18 United States Code, sections 1341 and 1343.

OBJECT OF THE CONSPIRACY AND SCHEME; GENERAL METHOD OF OPERATION

3. The object of the conspiracy and scheme was to obtain money and other things of value from numerous individuals throughout the State of Michigan, the United States and Canada, through a scheme to defraud, more fully set forth below, which involved personal contacts, interstate and foreign travel of victims and defendants, the use of interstate and foreign telephone calls and facsimiles, interstate wires and transfers of funds and the sending of funds and other items by the United States Postal Service and other interstate and foreign courier services.

4. It was part of the conspiracy and scheme that **Jack Rashid** and **Charles Rashid** (collectively referred to hereafter as the "**Rashids**"), defendants herein, while aiding and abetting each other, solicited and obtained money and other things of value from various individuals, and groups of individuals, by making false statements, and taking other steps calculated to persuade these individuals to invest in, or loan money to, VRSS, ART, and the **Rashid**. The solicitations were based upon false representations regarding monies the **Rashids** and their businesses had received or would be receiving due to alleged sales of their radar technology. Generally, the **Rashids** would solicit funds from a group of individuals through a contact person or persons, including, but not limited to, Gary Rudder, Joseph Hayden, Paul Tindall and Boyd Kraft; occasionally, the **Rashids** would solicit funds from individuals with no connection to a group. The **Rashids** would solicit funds from these groups or individuals at separate times but the false representations made to each group or individual were similar. Typically, **Jack Rashid**, accompanied by **Charles Rashid**, would make false statements to convince the groups or individuals that their loans/investments were secure; **Charles Rashid** furthered the false representations by explaining and demonstrating the technology. Sometimes, **Jack Rashid** alone would make the false representations. After the money was obtained, **Jack Chilingirian** worked to conceal the fraud, lull the individuals that provided funds, and prevent the early detection of the scheme, thereby causing the scheme to continue.

MANNER AND MEANS OF THE CONSPIRACY; THE SCHEME TO DEFRAUD

5. It was a further part of the conspiracy and scheme that the **Rashids** falsely represented that multi-million dollar contracts for the sale of their radar braking system, and related radar products, had been completed or nearly completed between themselves and/or their businesses and various major companies, including, but not limited to, Masco Corporation (hereinafter Masco), BMW, and North west Airlines. In fact, no such contracts existed nor were any such contracts close to being consummated.

6. It was a further part of the conspiracy and scheme that the **Rashids** falsely represented that major companies, including, but not limited to, Masco and BMW, had placed up to $250,000,000.00 in an escrow account with the National Bank of Detroit (hereinafter NBD) for the benefit of the individuals solicited by the defendants to provide funds, among others, based on the sale of the above products. In fact, no such escrow account ever existed.

7. It was a further part of the conspiracy and scheme that the **Rashids** falsely represented that the loans/ investments were guaranteed and would be repaid with extremely high rates of return from the funds held in escrow or received from the sale of the system/products.

8. It was a further part of the conspiracy and scheme that, in order to prevent detection of the scheme to defraud, the **Rashids** falsely represented to the individuals providing funds that the "contracts" with the major corporations were extremely confidential and that the "deal" could fall apart if these individuals told anyone about the

contracts or approached any of the parties to inquire about the contracts.

9. It was a further part of the conspiracy and scheme that, when the time arrived that some of the individuals who had provided funds were to receive their money or wanted their original investment back, the **Rashids** provided numerous false reasons to attempt to explain why they could not provide them with any money.

10. It was a further part of the conspiracy and scheme that the defendants, acting together, as well as individually, engaged in conduct to conceal the fraud, lull the individuals who had provided funds, and prevent the early detection of the scheme, thereby causing the scheme to continue, such acts being in furtherance of the conspiracy and the scheme to defraud. This part of the conspiracy and scheme was furthered as follows:

a. **Jack Rashid**, during the bankruptcy of VRSS, attempted to prevent the bankruptcy court from discovering that he had falsely represented to numerous individuals who had provided funds that the **Rashids** and their companies had completed contracts with Masco/BMW worth millions of dollars.

b. **Jack Chilingirian**, through his negotiations with the bankruptcy trustee's attorney, attempted to prevent the bankruptcy trustee from inquiring further about any Masco/BMW contracts and from providing information to federal criminal authorities about the Rashids.

c. **Jack Rashid**, when confronted with individuals who wanted their money back, would refer the individuals to his attorney, **Jack Chilingirian**, who, with

knowledge that the **Rashids** had taken the money under false pretenses, worked to pacify the individuals and lull them into believing that a major deal was likely but that, in the meantime, he would work to get them some money back from the **Rashids** if that is what they wanted.

d. **Jack Chilingirian,** in an effort to gain the trust of these individuals, would represent that he, too, felt like a victim, falsely representing that he had not been paid adequately by the **Rashids** and that he knew little or nothing about the source or amount of money that had been provided to the **Rashids**; in fact, at the time of these representations, **Jack Chilingirian** had already received, and continued to receive, substantial amounts of money from the **Rashids**, through **Jack Chilingirian**'s attorney client trust accounts at Comerica Bank (hereinafter attorney client trust accounts) and through other means.

e. **Jack Chilingirian**, while typically acknowledging to these individuals that no multi-million dollar deal existed with companies such as Masco and BMW, contrary to the assertions of the **Rashids**, attempted to prevent the individuals from pursuing civil or criminal actions against the **Rashids**, by suggesting that a major deal was nevertheless imminent and everyone would lose if they complained to authorities about the **Rashids**.

f. **Jack Chilingirian** and **Jack Rashid**, in negotiating with these individuals, or attorneys representing these individuals, who were demanding repayment, would demand the individuals sign affidavits indicating, among other things, that they had not been defrauded by **Jack Rashid**. As to some individuals, the affidavits demanded by **Jack Chilingirian** and **Jack Rashid** were false. **Jack Chilingirian** and **Jack Rashid** sought these

affidavits from individuals to prevent them from pursuing civil or criminal actions against the **Rashids** and to hinder investigations of the **Rashids** by governmental entities.

g. **Jack Chilingirian**, in the hopes of postponing or eliminating certain individuals' ability or desire to pursue civil or criminal actions against the **Rashids**, wrote checks or wired funds from his attorney client trust accounts to certain individuals. The majority of the funds available in the attorney client trust accounts came from loans and investments from individuals who had provided money to the **Rashids** on the basis of false representations.

h. **Jack Chilingirian**, in an effort to conceal the source and location of the funds placed in and disbursed from his attorney client trust accounts, and contrary to his obligations as a licensed attorney, did not keep accurate, complete and timely records of the deposits and withdrawals from the attorney client trust account.

i. **Jack Chilingirian**, in a further effort to conceal the source and location of the fraudulently obtained funds placed in and disbursed from the attorney client trust accounts, wrote out numerous checks from the attorney client trust account to **Jack Rashid** in increments of $10,000 or less. Subsequently, **Jack Rashid**, after having been introduced to bank personnel by **Jack Chilingirian**, caused these checks to be cashed or exchanged for cashier's check and money orders at a Comerica Bank, a bank where the **Rashids** had no account or previous business relationship.

OVERT ACTS

11. The following overt acts were committed or caused to be committed during and in furtherance of the conspiracy and scheme:

a. During in or about April 1-15, 1992, **Jack Rashid** provided Larry Cheek with fraudulent letters from Siemens Automotive confirming a contract dated February 26, 1992, between Siemens and **Jack Rashid** and that Siemens would be making a payment of $40,000,000.00 in May 1992 into an account specified by **Jack Rashid**.

b. At a meeting at the office of a law firm during in or about November 1992, **Jack Rashid** and **Charles Rashid**, while accompanied by **Jack Chilingirian** as their attorney, falsely represented to individuals who had provided the **Rashids** with funds that Siemens had to deny the existence of a contract it had with the **Rashids** so as not to breach a confidentiality clause in the contract.

c. During in or about Summer 1993, **Jack Rashid** falsely represented to Dr. Gary Rudder that he had negotiated a multi-million dollar deal with Masco and BMW.

d. During in or about February 1994, **Jack Rashid** falsely represented to Joseph Hayden that he had a contract between **Jack Rashid**, Masco and BMW, wherein **Rashid** was to receive $250,000,000 up front; **Jack Rashid** also showed Hayden a false escrow document from NBD which indicated that the $250,000,000 was being held in an escrow account and was to be transferred over to **Rashid** when the contract was finalized.

e. During on or about August 29, 1994, after the Rashids had been ordered to surrender their business, VRSS, to the bankruptcy trustee, **Jack Rashid** and **Charles Rashid** went to the offices of VRSS and removed various items from the premises and instructed the VRSS secretary to ignore the fact that they were in the offices.

f. During in or about September 1994, **Charles Rashid** invited Joseph Hayden to meet with BMW executives; it was later represented that this meeting was canceled due to BMW's chief negotiator being involved in an automobile accident.

g. During in or about February 1995, **Jack Chilingirian** falsely represented to Joseph Hayden that he, too, felt like a victim in that he had not been paid by the **Rashids** since 1992.

h. During in or about February 1995, **Jack Rashid**, during the bankruptcy of VRSS, attempted to prevent Joseph Hayden and Gary Rudder from advising the bankruptcy court that he had represented to them that the **Rashids** and their companies had negotiated a contract with Masco/BMW worth millions of dollars.

i. During on or about July 28, 1995, **Jack Chilingirian** sent Joseph Hayden an affidavit, to be signed by Hayden if he wanted money back from **Jack Rashid**, that **Jack Chilingirian** knew to be false.

j. During in or about June through September 1995, in Canada, **Jack Rashid** and **Charles Rashid** gave presentations to various individuals, all clients of Paul Tindall, soliciting them to invest in the radar technology for which **Jack Rashid** falsely represented they had a contract with a major company and that $250,000,000 was

placed in an escrow account which was available to insure their investments.

k. During in or about September 1995, **Jack Rashid** and **Charles Rashid** showed Paul Tindall and Anne Louise Tindall a fraudulent letter from John Kern of Northwest Airlines stating that Northwest Airlines was prepared to enter into an exclusive marketing agreement with **Rashid** for the radar technology ART had developed for airplanes.

l. During in or about October/November 1995, **Jack Chilingirian** requested that, as part of any bankruptcy settlement, the bankruptcy trustee and his attorney agree not to pursue their concerns regarding the **Rashids** with any federal authorities.

m. On or about November 13, 1995, **Jack Chilingirian**, in an attempt to prevent the bankruptcy trustee from inquiring further about any Masco/BMW contracts and from providing information to federal authorities about the **Rashids**, wired $232,000.00 to the bankruptcy trustee as a settlement payment; **Jack Chilingirian** falsely represented to the bankruptcy trustee's attorney that the money for the settlement was coming from a lender who was interested in having the bankruptcy matter conclude in an expeditious manner.

n. During in or about Fall 1995 through early 1996, **Jack Chilingirian** offered, through an attorney representing various individuals who had provided money to the Rashids, to provide more money in the form of a settlement if the individuals would sign affidavits reflecting they had not been defrauded by **Jack Rashid**.

o. During in or about May through August 1996, **Jack Rashid** solicited Jim Kraft, Boyd Kraft and others, to invest in radar technology that he falsely represented his company had developed for Northwest and by falsely representing that their investment would be secured by $250,000,000 in an NBD escrow account due to a completed deal between **Rashid** and Masco/BMW.

p. During in or about July 1996, **Jack Chilingirian** requested that John Schoendorff, as a precondition to receiving money back from the **Rashids**, sign a false affidavit indicating that he had not been defrauded by **Jack Rashid**.

q. During in or about April 1997, **Jack Rashid** requested that Gregory Songer, as a precondition to receiving money back from the Rashids, sign an affidavit indicating that he had not been defrauded by **Jack Rashid**.

r. The acts taken by the defendants in committing the wire and mail fraud offenses alleged in Counts 2 through 29 were also overt acts in furtherance of this unlawful conspiracy.

All in violation of Section 371 of Title 18 of the United States Code.

COUNTS TWO THROUGH FOURTEEN (18 U.S.C. §§ 1343, 2 – WIRE FRAUD, AIDING & ABETTING)

D-1 JACK RASHID
D-2 CHARLES RASHID
D-3 JACK CHILINGIRIAN

1. The General Allegations are realleged and incorporated by reference into these counts;

2. Paragraphs Two through Eleven of Count One are realleged and incorporated by reference into these counts;

3. On or about the dates indicated below, in the Eastern District of Michigan, Southern Division, and elsewhere, the defendants, **Jack Rashid**, **Jack Chilingirian** and **Charles Rashid**, aiding and abetting one another, having devised the above-described scheme to defraud and for obtaining money by false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme, did transmit and cause to be transmitted by means of wire in interstate and foreign commerce, the signals and sounds described below:

COUNT:	DATE:	TRANSMISSION:
2	9/17/93	Wire transfer of funds from Charles Rudder, California to Michigan
3	11/93	Telephone call, Michigan/California, with Charles Rudder and Gary Rudder
4	12/14/93	Wire transfer of funds from Charles Rudder, California to Michigan
5	1/94	Telephone call, Michigan/California, with Charles Rudder
6	10/94	Telephone call Michigan/Canada, with Tindall
7	11/94	Telephone call, Michigan/Canada, with Tindall
8	4/95	Facsimile of Northwest Airlines "letter" from Michigan to Canada
9	10/95	Telephone call, Michigan/Canada, with Tindall

10	10/95	Telephone call, Michigan/Canada, with Breda O'Donoghue
11	10/18/95	Wire transfer of funds from Jack Chilingirian Client Trust Account, Comerica Bank, Michigan, to Illinois account
12	10/18/95	Wire transfer of funds from Jack Chilingirian Client Trust Account, Comerica Bank, Michigan, to California account
13	5/22/96	Wire transfer of funds from Connecticut to Michigan, account of Boyd Kraft
14	6/7/96	Wire transfer of funds from Illinois to Michigan, account of Lawrence Haras

All in violation of Sections 1343 and 2 of Title 18 of the United States Code.

COUNTS FIFTEEN THROUGH TWENTY NINE
(18 U.S.C. §§ 1341, 2 – MAIL FRAUD,
AIDING & ABETTING)

D-1 JACK RASHID
D-2 CHARLES RASHID
D-3 JACK CHILINGIRIAN

1. The General Allegations are realleged and incorporated by reference in these counts;

2. Paragraphs Two through Eleven of Count One are realleged and incorporated by reference in these counts;

3. On or about the dates indicated below, in the Eastern District of Michigan, Southern Division, and

elsewhere, the defendants, **Jack Rashid, Jack Chilingirian** and **Charles Rashid**, aiding and abetting one another, having devised the above-described scheme to defraud and for obtaining money by false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme, caused to be delivered by United States Postal Service and other interstate and foreign courier services as indicated below, according to the directions thereon, the matters and things described below:

COUNT:	DATE:	CARRIER:	MATTERS/THINGS:
15	6/16/93	U.S. Postal Service	Letter from Jack Rashid to Dr. and Mrs. Gary Rudder
16	7/93	U.S. Postal Service	Investment check from Gary Rudder
17	2/24/94	U.S. Postal Service	Letter sent by Joseph Hayden to Jack Rashid requesting meeting to see Masco/BMW contract and NBD escrow letter
18	3/25/94	U.S. Postal Service	Letter, Joseph Hayden/ Jack Rashid, summarizing investors to date and containing check
19	4/94	U.S. Postal Service	Investment check from Charles Rudder
20	9/94	U.S. Postal Service	Investment check from Charles Rudder
21	7/6/95	Federal Express	Investment checks from Canada through Tindall

22	7/17/95	Federal Express	Investment checks from Canada through Tindall
23	7/21/95	Federal Express	Investment checks from Canada through Tindall
24	7/21/95	U.S. Postal Service	Letter, Jack Chilingirian to Vince Halek and Joseph Hayden, outlining proposed settlement
25	8/3/95	Federal Express	Investment checks from Canada through Tindall
26	8/28/95	Federal Express	Investment checks from Canada through Tindall
27	4/25/96	U.S. Postal Service	Letter sent by Jack Chilingirian to attorney Stuart Goldstein
28	7/10/96	U.S. Postal Service	Investment check from Philip and Janice Bobek
29	7/11/96	U.S. Postal Service	letter sent by Jack Chilingirian to John Schoendorff outlining proposed settlement

All in violation of Sections 1341 and 2 of Title 18 of the United States Code.

COUNT THIRTY (18 U.S.C. 2314, 2 – INTERSTATE TRANSPORTATION OF FUNDS TAKEN BY FRAUD, AIDING AND ABETTING)

D-1 JACK RASHID
D-3 JACK CHILINGIRIAN

During in or about December 1994, through November 1995, in the Eastern District of Michigan, Southern

Division, and elsewhere, the defendants, **Jack Rashid** and **Jack Chilingirian**, aiding and abetting one another, did knowingly transport and cause to be transported and transmitted in foreign commerce, that is, between Michigan and Canada, funds and monies in the amount of $5,000.00 or more, knowing the same to have been stolen, converted and taken by fraud; all in violation of Sections 2314 and 2 of Title 18 of the United States Code.

COUNT THIRTY ONE
(18 U.S.C. § 1512(b)(1) –
TAMPERING WITH A WITNESS)

D-3 JACK CHILINGIRIAN

That during in or about July 1996, in the Eastern District of Michigan, Southern Division, the defendant, **Jack Chilingirian**, did knowingly and corruptly persuade, and attempt to corruptly persuade, John Schoendorff, with the intent to influence and prevent the testimony of John Schoendorff in an official proceeding, to wit, an investigation before an Eastern District of Michigan Federal Grand Jury and any criminal charges filed stemming from that investigation in a Court of the United States, by persuading John Schoendorff, if he wanted to get back money that he and his family invested with **Jack Rashid**, to sign a false affidavit indicating, among other things, that **Jack Rashid** did not defraud him; all in violation of Section 1512(b)(1) of Title 18 of the United States Code.

COUNT THIRTY TWO (18 U.S.C. § 1512(b)(1) – TAMPERING WITH A WITNESS)

D-1 JACK RASHID

That on or about April 1, 1997, in the Eastern District of Michigan, Southern Division, the defendant, **Jack Rashid**, did knowingly and corruptly persuade, and attempt to corruptly persuade, Gregory Songer, with the intent to influence and prevent the testimony of Gregory Songer in an official proceeding, to wit, an investigation before an Eastern District of Michigan Federal Grand Jury and any criminal charges filed stemming from that investigation in a Court of the United States, by requiring Gregory Songer, if he wanted to get back money that he invested with **Jack Rashid**, to sign a false affidavit indicating, among other things, that **Jack Rashid** did not defraud him; all in violation of Section 1512(b)(1) of Title 18 of the United States Code.

COUNT THIRTY THREE
(18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h) – CONSPIRACY TO LAUNDER MONETARY INSTRUMENTS)

D-1 JACK RASHID
D-3 JACK CHILINGIRIAN

That from in or about December of 1994 through in or about October of 1996, in the Eastern District of Michigan, Southern Division, and elsewhere, defendant **Jack Rashid** and defendant **Jack Chilingirian**, knowing that the property involved represented the proceeds of some form of unlawful activity, as defined in Title 18, United States Code, section 1956(c)(1), did knowingly, intentionally and unlawfully combine, conspire, confederate and agree with other persons whose names are known and unknown to

the Grand Jury, to conduct and cause to be conducted financial transactions affecting interstate and foreign commerce which involved the proceeds of specified unlawful activity, that is, mail and wire fraud, felonies under title 18, United States Code, Sections 1341 and 1343, with the intent to promote the carrying on of specified unlawful activity, and knowing that the transactions were designed in whole or in part to conceal and disguise the nature, location, source, ownership and control of the proceeds of such unlawful activity; all in violation of title 18, United States Code, Sections 1956(a)(1)(A)(i), 1956(a)(1)(B)(i) and 1956(h).

It was part of the money laundering conspiracy that **Jack Rashid** and **Jack Chilingirian** would take proceeds obtained through mail and wire fraud and would deposit such proceeds into client trust accounts maintained by attorney **Jack Chilingirian**, for the purpose of concealing the ownership, control and location of such proceeds and for the purpose of disguising the nature of such proceeds.

It was further part of this money laundering conspiracy that **Jack Rashid** and **Jack Chilingirian** would take proceeds obtained from victims of their mail and wire fraud scheme and transfer those proceeds to other victims of their mail and wire fraud scheme, in an effort to lull the recipients and to keep them from pursuing legal or criminal actions against **Jack Rashid** and **Jack Chilingirian** and other persons, for the purpose of promoting the underlying mail and wire fraud scheme.

All in violation of Title 18, United States Code, Section 1956(h).

COUNT THIRTY FOUR
(18 U.S.C. § 1957 – LAUNDERING
OF MONETARY INSTRUMENTS)

D-1 JACK RASHID

That in or about July of 1996, in the Eastern District of Michigan, Southern Division, defendant **Jack Rashid**, did knowingly engage and attempt to engage in a monetary transaction affecting interstate and foreign commerce in criminally derived property of a value greater than $10,000.00, that is, the proceeds of mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, such transaction involving the purchase of a 1996 SeaRay Motor Boat, Model 330DA from a business involved in boat sales; all in violation of Title 18, United States Code, Section 1957.

COUNT THIRTY FIVE
(18 U.S.C. § 1957 – LAUNDERING OF
MONETARY INSTRUMENTS)

D-1 JACK RASHID

That in or about July of 1995, in the Eastern District of Michigan, Southern Division, defendant **Jack Rashid**, did knowingly engage and attempt to engage in a monetary transaction affecting interstate and foreign commerce in criminally derived property of a value greater than $10,000.00, that is, the proceeds of mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, such transaction involving the lease of a 1995 BMW 540i automobile, from a business engaged in vehicle sales; all in violation of Title 18, United States Code, Section 1957.

COUNT THIRTY SIX
(18 U.S.C. § 1957 – LAUNDERING OF MONETARY INSTRUMENTS)

D-1 JACK RASHID

That in or about June of 1995, in the Eastern District of Michigan, Southern Division, defendant **Jack Rashid**, did knowingly engage and attempt to engage in a monetary transaction affecting interstate and foreign commerce in criminally derived property of a value greater than $10,000.00, that is, the proceeds of mail and wire fraud, felonies under Title 18, United States Code, Sections 1341 and 1343, such transaction involving the acquisition of an interest in certain real property located at 7484 Blue Water Street, Lexington, Michigan with a business involved in real estate closings and settlements; all in violation of Title 18, United States Code, Section 1957.

FORFEITURE ALLEGATION

D-1 JACK RASHID
D-3 JACK CHILINGIRIAN

The allegations of Counts Thirty Three, Thirty Four, Thirty Five and Thirty Six are realleged and incorporated by reference herein for the purpose of seeking forfeitures pursuant to the provisions of Title 18, United States Code, Section 982.

As a result of the foregoing offenses in violation of Title 18, United States Code, Sections 1956 and 1957, defendants **Jack Rashid** and **Jack Chilingirian** shall forfeit to the United States any property, real or personal, involved in such offenses, or any property traceable to such property.

Property subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 982 includes, but is not limited to, the following:

(a) One 1996 SeaRay Motor Boat, Model 330DA, Serial Number SERP3158A6760678, with all appurtenances.

(b) One 1995 BMW 540i, Vehicle Identification Number (VIN) WBAHE6320SGF33190.

(c) One 1996 Lincoln Town Car, VIN 1LNLM82W 3TY714269;

(d) One 1995 Volkswagen Cabriolet, VIN WVWBC 81E4SK009753;

(e) One 1970 Plymouth Roadrunner, VIN RM23N0A 242973;

(f) One 1995 Jeep CJ, VIN 1J4FY29S0SP292773;

(g) One 1969 Ford Mustang, VIN 9T02R162573;

(h) The real property located at 7484 Blue Water Street, Lexington, Michigan, being more fully described as:

Lots 296 and 297, BLUE WATER BEACH SUBDIVISION, according to the Plat thereof as recorded in Liber 3 of Plats, Pages 48 to 50, Sanilac County Records.

Tax I.D. No. 76-261-070-000-296-20 (Lot 296)
Tax I.D. No. 76-261-070-000-291-00 (Lot 297); and

(i) An amount of not less than $2,589,699.25 in United States Currency, or such amount as is proved at trial in this matter, in that such sum in aggregate was involved in the conspiracy to launder monetary instruments charged in Count

Thirty Three of this Indictment, or is traceable thereto.

If any of the property described above as being subject to forfeiture, as a result of the act or omission of a defendant:

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third party;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot subdivide without difficulty; it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), as incorporated by 18 U.S.C. § 982(b), to seek to forfeit any other property of that defendant up to the value of the property listed above.

All in violation of Title 18, United States Code, Section 982.

THIS IS A TRUE BILL.

/s/ _____
FOREPERSON

SAUL A. GREEN
United States Attorney

/s/
BLONDELL L. MOREY
Assistant U.S. Attorney
Chief, Economic Crime Unit

/s/ Patrick E. Corbett
PATRICK E. CORBETT
Assistant U.S. Attorney

/s/ Terrence G. Berg
TERRENCE G. BERG
Assistant U.S. Attorney

Dated: 11-10-98